21-532

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~559.~~ ~~555~~-62

NELSON EDWARDS, CHARLES A. WOOLSEY, AND GEORGE
COLLINS, PLAINTIFFS IN ERROR,

VS.

GEORGE W. ELLIOTT, DAVID RIPLEY, WILLIAM A. RIPLEY,
CHARLES O. RIPLEY, AND JOHN W. RIPLEY.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF
NEW JERSEY.

FILED DECEMBER 6, 1872.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the court of errors and appeals of the State of New Jersey, in the last resort in all causes, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between Nelson Edwards, Charles A. Woolsey, and George Collins, plaintiffs in error, and George W. Elliott, David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, defendants in error, (which plea had been by writ of error removed from before the justices of the supreme court of the said State, into the said court of errors and appeals, before you, the judges thereof,) a manifest error hath happened, to the great damage of the said plaintiffs in error, as is said, and as appears by their complaint:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twelfth day of August, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] S. D. OLIPHANT,
Clerk of the Circuit Court of the United States of America,
for the district of New Jersey, in the Third Circuit.

2 *The answer of the judges of the court of errors and appeals.*

NEW JERSEY, *ss:*

The record and proceedings whereof mention is within made, with all things touching the same, we do certify and send to the Supreme Court of the United States, in a certain schedule to this writ annexed, as within we are commanded.

A. O. ZABRISKIE, [SEAL.]
Pres. of N. J. Court of Errors and Appeals.

(Indorsed:) U. S. Supreme Court. Nelson Edwards et al., pl'ffs in error, vs. George W. Elliott et al., def'ts in error. Writ of error to the court of errors & appeals of N. J. Ret'ble Dec'r term A. D. 1872. A. S. Jackson, att'y.

This writ allowed and a return thereto ordered.

A. O. ZABRISKIE,
Pres. N. J. C't of Errors & Appeals.

3 NEW JERSEY, *ss:*

[L. S.] The State of New Jersey to our justices of our supreme court, greeting:

Because, in the record and proceedings, and also in the giving of judgment in a plaint which was in our said court, before the justices thereof, between George W. Elliott, David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, plaintiffs, and Nelson Edwards, Charles A. Woolsey, and George Collins, defendants, in a plea of debt, as it is said, manifest error hath intervened, to the great damage of the said defendants, as by their complaint we are informed:

We, being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that, if judgment be given thereupon, then you distinctly and openly send, under your seal, the record of said judgment and proceedings aforesaid, with all things touching and concerning the same, to our court of errors and appeals, to be held at Trenton, on the third Tuesday of November instant, and this writ, that, the record and proceedings aforesaid being inspected, we may
4 further cause to be done thereupon, what of right and according to law ought to be done.

Witness the Honorable Abraham O. Zabriskie, our president, at Trenton, the sixteenth day of November, A. D. eighteen hundred and seventy-one.

HENRY C. KELSEY, *Clerk.*

A. S. JACKSON, *Att'y.*

(Indorsed:) N. J. court of errors & appeals. Nelson Edwards et al., pl't'ffs in error, vs. George W. Elliott et al., def'ts in error. Writ of error to the sup. court. Ret'ble, Nov. term, A. D. 1871. A. S. Jackson, att'y.

Presented to me in open court Nov. 16th, 1871, and a return thereto is hereby ordered.

M. BEASLEY, *Ch. Jus.*

The answer of the justices of the supreme court of New Jersey within named.

The record and proceedings whereof mention in within made, with all things touching and concerning the same, we do certify to the court of errors and appeals, in a certain schedule to this writ annexed, as within we are commanded.

M. BEASLEY, [L. S.]
Ch. Jus.

Filed March 11, 1872. Henry C. Kelsey, clerk.

5 New Jersey supreme court.

GEORGE ELLIOTT, DAVID RIPLEY, WILLIAM A. Ripley, Charles O. Ripley, & John W. Ripley,
vs.
NELSON EDWARDS, CHARLES A. WOOLSEY, & George Collins.
} In case on postea, &c.

A. T. Compton, att'y.

As yet, of the sixth day of August, A. D. eighteen hundred and sixty-seven.

Witness Mercer Beasley, esq., chief justice.

CHAS. P. SMITH, *Clerk.*

Hudson County, *ss:*

Nelson Edwards, Charles A. Woolsey, and George Collins, the defendants in this suit were summoned to answer George Elliott, David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, the plaintiffs therein, of a plea that they render unto them the sum of four thousand and eight hundred and ninety-four dollars and thirty-two cents, which unto them they owe and from them unjustly detain; 6 and thereupon the said plaintiffs, by Alexander T. Compton, their attorney, complain for that, whereas the said defendants heretofore, to wit, on the second day of July, in the year one thousand eight hundred and sixty-seven, in the county aforesaid, by their certain writing-obligatory, sealed with their seals, and now shown to the court here, the date whereof is the day and year aforesaid, acknowledge themselves, and each for himself, to be held and firmly bound unto the said plaintiffs, in the sum of four thousand eight hundred and ninety-four dollars and thirty-two cents above demanded, lawful money of the United States of America, to be paid to the said plaintiffs; and the said plaintiffs, according to the form of the statute in such case made and provided, sa*ith* that the said writing-obligatory is subject to a certain condition thereunder written, whereby, after reciting that, whereas, heretofore, a warrant was issued under and by virtue of the provisions of the act entitled "An act for the collection of demands against ships, steamboats, and other vessels," approved March 20, 1857, by Thomas N. McCarter, a supreme court commissioner, at the suit of George 7 W. Elliott, directed to Jacob M. Merseless, sheriff of the county of Hudson, commanding him to attach, seize, and safely keep a three-masted schooner called or to be called the John J. Ward; and whereas said sheriff has attached said vessel and has the same in his keeping; and whereas, on the twenty-first day of June last, said David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, claiming a lien on the property so seized for the sum of two thousand two hundred and forty-five $\frac{46}{100}$ dollars, have delivered to said commissioner an account in writing of their demand, and have applied to be deemed attaching creditors of said vessel under the provisions of said act, it is declared in said condition that if the said Nelson Edwards, Charles A. Woolsey, and George Collins, shall pay the amount of all such claims and demands as shall have been exhibited to said commissioner, which shall be established to be subsisting liens upon said vessel, pursuant to the provisions of said act, at the time of exhibiting 8 the same, respectively, then the said obligation to be void; else to remain in force as by the said writing-obligatory and the copy thereof hereto annexed will more fully appear. And the said George W. Elliott, one of the said plaintiffs, according to the form of the statute in such case made and provided, saith that the sum of two hundred and one dollars and seventy cents, for which he exhibited a lien upon said vessel, is due to him for materials furnished in this State by the said George W. Elliot, to wit, twenty-seven pieces chestnut timber, amounting to the aforesaid sum of two hundred and one dollars and seventy cents, for and toward the building said schooner or vessel, the John J. Ward, in a ship-yard at East Newark, at the request of Nathaniel B. Ellis, and Henry C. Jerolemon, agents of said vessel.

And the said David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, the others of said plaintiffs, according to the form

of the statute in such case made and provided, say that the
9 sum of two thousand two hundred and forty-five dollars and
forty-six cents, for which they exhibited a lien upon said vessel, is due to them from Nathaniel B. Ellis and Henry C. Jerolemon, the builders and owners of said vessel, for materials and articles furnished in this State by the said David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, and at the request of the said Ellis and Jerolemon, builders and owners as aforesaid, for and towards the building & constructing the said vessel, in a ship-yard at East Newark, in the county of Hudson aforesaid, in the several days between the 15th day of January, 1867, and the 10th day of May of the same year.

And the said George W. Elliot, one of the said plaintiffs, avers that his said debt, claim, and demand so as aforesaid due to him, amounting as aforesaid to two hundred and one dollars and seventy cents, was a subsisting lien upon the said schooner, the John J. Ward, at the time of
the exhibition thereof before the said Thomas N. McCarter, com-
10 missioner as aforesaid, by him, the said Elliott. And the said
David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, four, and the others of the said plaintiffs, aver that the said debt, claim, and demand, so as aforesaid due to them, amounting, as aforesaid, to two thousand two hundred and forty-five dollars and forty-six cents, was a subsisting lien upon the said schooner, the John J. Ward, at the time of the exhibition thereof before the said Thomas N. McCarter, commissioner as aforesaid, by the said David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, four, and the others of said plaintiffs.

Nevertheless the said plaintiffs say that neither the said defendants nor the said Nathaniel B. Ellis and Henry C. Jerolemon did *not* pay to the said plaintiffs or otherwise the said sum above demanded, nor the said sum of two hundred and one dollars and seventy cents to the said Elliot, nor the said sum of two thousand two hundred and forty-five
dollars and forty-six cents to the said David Ripley, William A.
11 Ripley, Charles O. Ripley, and John W. Ripley, or any or other
sums, the claims and demands of said plaintiffs against said Jerolemon and Ellis, upon said schooner John J. Ward, but have wholly failed and made default; by reason of said non-payments and breach the said writing-obligatory became and is forfeited, and therefore an action hath accrued to said plaintiffs to demand and have of and from the said defendants the said sum above demanded.

Yet the said defendants, although often requested so to do, have not paid the said sums above demanded, or any part thereof, to the said plaintiffs, or otherwise, but to pay the same ha*th* hitherto wholly refused, and still do refuse so to do, to the damage of the said plaintiffs $100; and therefore they bring their suit, &c.

And the said plaintiffs bring here into court the said writing-obligatory, sealed as aforesaid, which gives sufficient evidence to the said
court here of the debt aforesaid, in form aforesaid, the date
12 whereof is a certain day and year therein mentioned, to wit, on
the day and year in the behalf above stated.

Notice is hereby given that the following is a true copy of the bond or obligation on which the foregoing declaration is founded, and which is referred to in the foregoing declaration, viz:

Know all men by these presents that we, Nelson Edwards, Charles A. Woolsey, and George Collins, of the county of Hudson, in the State of New Jersey, are held and firmly bound unto George W. Elliot, David

Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, in the sum of four thousand and eight hundred and ninety four $\frac{32}{100}$ dollars, lawful money of the United States of America, to be paid to the said obligees, their executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, o'r heirs, executors, and administrators, jointly and severally, firmly by the' presents, sealed with our seals, dated the second day of July, one thousand
13 eight hundred and sixty-seven.

Whereas, heretofore, a warrant was issued, under and by virtue of the provisions of the act entitled "An act for the collection of demands against ships, steamboats, and other vessels," approved March 20, 1857, by Thomas N. McCarter, a supreme court commissioner, at the suit of George W. Elliott, directed to Jacob M. Merseles, sheriff of the county of Hudson, commanding him to attach, seize, and safely keep a three-masted schooner or vessel, called, or to be called, the John J. Ward;

And whereas said sheriff has attached said vessel, and has the same in his keeping;

And whereas, on the twenty-first day of June last, said David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, claiming a lien on the property so seized for the sum of two thousand two hundred and forty-five $\frac{46}{100}$ dollars, have delivered to said commissioner an account, in writing, of their demand, and have applied to be deemed attaching creditors of said vessel, under the provisions of said act:

14 Now, therefore the condition of the above obligation is, that if the above-named obligors shall pay the amount of all such claims and damages as shall have been exhibited to said commissioner, which shall be established to be subsisting liens upon said vessel, pursuant to the provisions of said act, at the time of exhibiting the same respectively, then the above obligation to be void; else to remain in force.

NELSON EDWARDS. [L. S.]
C. A. WOOLSEY. [L. S.]
GEORGE COLLINS. [L. S.]

Sealed and delivered in presence of—
A. S. JACKSON.

[U. S. $2.50 int. rev.]

STATE OF NEW JERSEY,
County of Hudson, ss:

Nelson Edwards, Charles A. Woolsey, and George Collins, the within-named obligors, being duly sworn, each for himself, do depose and say, that he is worth the sum of five thousand dollars in real estate, in said county, after all his debts and liabilities are discharged.

15 NELSON EDWARDS.
C. A. WOOLSEY.
GEORGE COLLINS.

Sworn and subscribed before me, July 3rd, A. D. 1867, at Jersey City.
ISAAC ROMAINE,
Master in Chancery.

And that the following is a statement of the nature and particulars of the demand and claim of George W. Elliott, plaintiff aforesaid, viz:

Nov.,	1866.	1	piece	chestnut	timber	154	ft.
"	"	1	"	"	"	144	"
"	"	1	"	"	"	152	"
"	"	1	"	"	"	184	"
"	"	1	"	"	"	280	"
"	"	1	"	"	"	189	"
"	"	1	"	"	"	200	"
"	"	1	"	"	"	229	"
"	"	1	"	"	"	94	"
"	"	1	"	"	"	254	"
"	"	1	"	"	"	341	"
"	"	1	"	"	"	290	"
"	"	1	"	"	"	180	"
"	"	1	"	"	"	233	"
"	"	1	"	"	"	260	"
"	"	1	"	"	"	210	"
"	"	1	"	"	"	132	"
"	"	1	"	"	"	290	"
"	"	1	"	"	"	172	"
"	"	1	"	"	"	264	"
"	"	1	"	"	"	225	"
"	"	1	"	"	"	348	"
"	"	1	"	"	"	90	"
16							
"	"	1	"	"	"	264	"
"	"	1	"	"	"	195	"
"	"	1	"	"	"	200	"
"	"	1	"	"	"	189	"
		27	pieces	chestnut	timber	5,763	ft.

Amount due, with interest, @ 03½, $201.70.

And that the following is a statement of the nature and particulars of the demand and claims of David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, plaintiffs aforesaid, against said Nathaniel B. Ellis and Henry C. Jerolemon, the builders and owners of the schooner John J. Ward, viz:

1867.

Jan.	15.	1,074	ft. Georgia pine	$ 65 cts.,	$69 81
"	31.	138	cubic ft. white-oak	75 cts.,	103 50
"	"	5,049	ft. merch. pine decking	$ 65	328 19
"	"	810	ft. sec. " "	$ 43⅓	35 10
Feb.	8.	92	cubic ft. oak	75 cts.,	69 00
"		327	ft. oak	$ 70	22 89
"	21.	1,843	" Geo. pine	$ 65	119 80
"	26.	145	" c'f & white-pine	50c.,	72 50
"	28.	1,772	" oak wales	70c.,	124 04
		193	" plank	65c.,	12 55
		735	" square oak	70c.,	51 45
		220	" oak plank	65c.,	14 30
March	4.	1,034	" wales	70c.,	72 38
		1,392	" Ohio oak	70c.,	97 44
		6,377	" oak plank	65c.,	414 51

"	18.	877 "	Georgia pine..................	65c.,	57 01
"	"	1,728 "	white-pine..................	45c.,	77 76
17					
March	18.	325 "	white-pine..................	60c.,	$19 50
"	22.	180 "	" "	45c.,	8 10
"	22.	93 "	Georgia "	65c.,	6 05
"	28.	466 "	white-oak, (Ohio)	70c.,	32 62
"	29.	4,857 "	merch. white decking.........	60c.,	291 42
"	30.	2,928 "	oak plank	65c.,	190 32
April	8.	132 "	oak wales	70c.,	9 24
"	19.	2,674 "	" pl'k..................	65c.,	173 81
		1,288 "	white-pine..................	40c.,	51 52
		475 "	" "	55c.,	26 13
"	23.	310 "	white-oak	65c.,	20 15
May	8.	1,034 "	" pine..................	60c.,	62 04
"	10.	189 "	oak plank..................	65c.,	12 33
					2,645 46
Credit, April 10, 1867, by cash..........................					400
Amount due, with interest					2,245 46

A. T. COMPTON,
Att'y of Pl'ffs.

Pleas.

1. And the defendants, by Abraham S. Jackson, their attorney, come and defend the wrong and injury, when, &c., and say that the said supposed writing-obligatory, in the said declaration mentioned, is not their deed; and of this they put themselves upon the country.

18 2. And for a further plea in this behalf, the defendants, by like leave of the court, say that they ought not to be charged with the said debt, by virtue of the said supposed writing-obligatory, because they say that they do not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiffs have above thereof complained against them; as of this they put themselves upon the country.

3. And, for a further plea in this behalf, the defendants, by like leave, say that they ought not to be charged with the said debt, by virtue of the said supposed writing-obligatory, because they say that there is not due to the plaintiff Elliott, from the said Ellis and Jerolemon, the sum of two hundred and one dollars and seventy cents, for materials furnished in this State by the said Elliott to the said Ellis and Jerolemon, for and towards the building of said schooner or vessel, in manner and form, *and* the said plaintiffs have above thereof complained
19 against them; and of this they put themselves upon the country.

4. And, for a further plea in this behalf, the defendants, by like leave, say that they ought not to be charged with the said debt by virtue of the said supposed writing-obligatory, because they say that there is not due to the said plaintiffs David, William, Charles, and John, from the said Ellis and Jerolemon, the sum of two thousand two hundred and forty-five dollars and forty-six cents, for materials and articles furnished in this State for and towards the building, constructing, fitting, furnishing, and equipping the said schooner or vessel,

in manner and form as the plaintiffs have above thereof complained against them; and of this they put themselves upon the country.

5. And, for a further plea in this behalf, the defendants, by like
leave, say that they ought not to be charged with the said debt by
virtue of the said supposed writing-obligatory, because they
20 say that the said debt, claim, and demand of the plaintiff
Elliott, amounting to two hundred and one dollars and seventy
cents, was not a subsisting lien upon the said schooner at the time
of the exhibition thereof before the said supreme court commissioner
by the plaintiff Elliott, in manner and form as the plaintiffs have
above thereof complained against them; and of this they put themselves upon the country.

6. And, for a further plea in this behalf, the defendants, by like
leave, say that they ought not to be charged with the said debt by
virtue of the said supposed writing-obligatory, because they say that
the said debt, claim, and demand of the plaintiffs David, William,
Charles, and John, amounting to two hundred and forty-five dollars and
forty-six cents, was not a subsisting lien upon the said schooner at the
time of the exhibition thereof before the said supreme court commissioner by the plaintiffs David, William, Charles, and John, in manner
and form as the plaintiffs have above thereof complained against
21 them; and of this they put themselves upon the country.

7. And, for a further plea in this behalf, the defendants, by like leave, say that they ought not to be charged with the said debt, by virtue of the said supposed writing-obligatory, because they say that the said Ellis and Jerolemon, or either of them, were not, at any time, the owners or agents of said schooner, in manner and form as the plaintiffs have above thereof complained against them; and of this they put themselves upon the country.

8. And, for a further plea in this behalf, the defendants, by like leave,
say that they ought not to be charged with the said debt, by virtue of
the said supposed writing obligatory, because they say that the two
several debts in the declaration mentioned, or either of them, were not
contracted by any master, owner, agent, or consignee of said schooner
or vessel, on account of materials or articles furnished in this State for
or towards the building, repairing, fitting, furnishing, or equipping
22 said schooner or vessel; and this the defendants are ready to
verify. Wherefore they pray judgment if they ought to be charged
with the said debt by virtue of the said supposed writing-obligatory.

9. And, for a further plea in this behalf, the defendants, by like leave, say that they ought not to be charged with the said debt by virtue of the said supposed writing-obligatory, because they say that, at the time of the issuing and execution of the aforesaid warrant, there was no such vessel or schooner called the John J. Ward in being, nor had there then been any such vessel or schooner in being; and this the defendants are ready to verify. Wherefore they pray judgment if they ought to be charged with the said debt by virtue of the said supposed writing-obligatory.

STATE OF NEW JERSEY,
County of Hudson, ss:

Charles A. Woolsey, being duly sworn, on his oath saith that
23 he is one of the defendants above named; that the above pleas
are not intended for the purpose of delay; and that he verily believes that the defendants have a just and legal defense to said action
on the merits of the case.

C. A. WOOLSEY.

Sworn and subscribed, Oct. 5, A. D. 1867, before me, at Jersey City.

I. R. WORTENDYKE,
Master in Chancery, N. J.

Replication.

And the plaintiffs, as to the first seven pleas of the defendants, by them above pleaded, and whereof they have put themselves upon the country, do the like.

And the plaintiffs, as to the plea of the defendants by them eighthly above pleaded, say that the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having and maintaining this action against the defendants, because they say that the two several debts in the declaration mentioned, or either of them, were contracted by a master, owner, agent, or consignee of said schooner or vessel, on account of materials or articles furnished in this State for or toward the building, repairing, fitting, furnishing, or equipping said schooner or vessel; and this the plaintiffs pray may be inquired of by the country; and the defendants do the like.

And the plaintiffs, as to the plea of the defendants by them ninthly above pleaded, say that the plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having and maintaining this action against the defendants, because they say that, at the time of the issuing and execution of the aforesaid warrant, there was a vessel or schooner called the John J. Ward in being, and that such veesel or schooner had been in being; and this the plaintiffs pray may be inquired of by the country; and the defendants do the like.

Therefore, let a jury thereupon come before the chief justice or some other justice of the supreme court of the judicature of the State of New Jersey, at a circuit court to be holden at Jersey City, in and for the county of Hudson, on the third Tuesday of January, A. D. eighteen hundred and seventy-one, by whom, &c.; and the same day is given to the parties aforesaid, there, &c.

24 And now, at this day, to wit, the sixth day of June, A. D. eighteen hundred and seventy-one, before our said supreme court, at Trenton, come the parties aforesaid, by their attorneys aforesaid, and the justice, before whom, &c., having sent here his record had before him in these words, to wit:

Afterwards, that is to say, at a circuit court, holden at Jersey City, in and for the county of Hudson, by the Honorable Joseph D. Bedle, one of the justices of the supreme court, on the third Tuesday of January, A. D. 1871, come as well the within-named plaintiffs as the within-named defendants, by their respective attorneys within mentioned, and the jurors of the jury, summoned to try the said issue, having been called, also come, who, to speak the truth of the matters within contained, having been chosen, tried, and sworn, say upon their oath—

"1. That the said bond or obligation was sealed and delivered by the defendants in the words contained in the copy thereof, annexed to the declaration.

"2. And, likewise, that the facts recited in the preamble to the condition of said bond are true.

25 "3. And, likewise, that all the parties hereto and Nathaniel B. Ellis and Henry C. Jerolemon were residents, at the time of the

contracting the debts hereinafter mentioned, of the State of New Jersey.

"4. And, likewise, that the plaintiff Elliott furnished, in this State, chestnut timber to said Ellis and Jerolemon, at their request, in the sum of $201.70, which timber was used in the building of the schooner to be called the John J. Ward, and that said Ellis and Jerolemon still owe him said sum of money for said timber.

"5. And, likewise, that the plaintiffs David, William, Charles, and John Ripley, furnished, in this State, lumber to said Ellis and Jerolemon, at their request, in the sum of $2,245.46, which lumber was used in the building of said schooner, and that said Ellis and Jerolemon still owe them the said sum of money for said lumber.

"6. And, likewise, that said Ellis and Jerolemon were ship-builders and partners, and were the builders of said schooner, under the
26 contract executed by said Jerolemon and the other parties thereto, and that said contract was assigned by said Jerolemon to said Nelson Edwards.

"7. And, likewise, that said contract and assignment are contained in the following words, to wit:

"'[U. S. rev. stamp 5 cents.]

"'This article of agreement, made and concluded this 3rd day of November, 1866, between Henry C. Jerolemon, of Newark, N. J., of the first part, and Nelson Edwards, John L. Hasbrouck, Baxter and Livingston, David Ayers, John J. Ward, J. D. Higgins, D. Yoe, Henry C. Jerolemon, Hopkins and Nelson, J. M. Harlow, R. E. Stillwell, of the second part, witnesseth:

"'The party of the first part, for and in consideration of the sum of fifty-four dollars ($54) per ton, agree to build for the parties of the second part a centre-board schooner, of the following dimensions, viz: One hundred and seventeen feet keel, measuring from the middle of scarf of stem on keel to after part of stern-post; thirty-one feet five inches beam, ($31\frac{5}{12}$,) measuring from the inside of one w*h*ale to the outside
27 of the other; and ten feet deep, (10,) measuring on the shoalest part of the vessel's hold; measurement of vessel to be computed from shoalest part of vessel's hold.

"'KEEL.—Keel to be of the best white-oak, sixteen inches wide, and eight inches below the garboard.

"'KELSON.—Kelson to be fourteen inches wide and of the usual thickness.

"'FRAME.—Frame to be of white-oak and chestnut, moulded twelve inches in the throat, and to be placed twenty-four inches from centre to centre.

"'PLANK.—Bottom plank to be of best white-oak, three inches thick, with a proper taper to the bends, and no projections.

"'W*h*ALES.—Eight streaks, five inches thick, to be of best white-oak, diminishing the next five streaks to make fair work.

"'CEILING.—Ceiling from kelson to bilge; streaks to be of white-oak or yellow-pine, three inches thick.

"'BILGE-STREAKS.—Bilge-streaks to be seven inches thick, of white-oak or yellow-pine, tapering up to five inches up to the clamps.

"'CLAMPS.—Two sets, six inches thick, of white-oak or yellow-pine.

"'WELL.—The well to be twenty-four feet long and planked
28 with five and one-half-inch white-oak of the best quality; to be fitted and finished in the same manner as the sch'r Carrie Holmes.

"'CENTRE-BOARD.—Centre-board to be of white-oak or walnut plank, six inches thick.

“‘Deck-beams.—Deck-beams to be of white-oak and yellow-pine, twelve inches wide and ten inches deep, to be secured by lodging, bosom, and hanging-knees of white-oak or hackmatack, of suitable size, and fastened in the best manner, and to have a suitable number of breast-hooks for strength.

“‘Deck-plank.—Deck-plank to be of white-pine, three inches thick, and fastened with galvanized iron.

“‘Stanchions.—Stanchions for rail to be of locust, and of suitable size.

“‘Fastenings.—Keel, kelson, stern, and stern-post, and well-room to be bolted with best quality iron, one inch and one-eighth in diameter; plank to be square, fastened with galvanized-iron spikes and locust treenails, and to be galvanized-iron butt-bolted; the vessel to be trunneled with locust treenails, driven through and through, and wedged on both sides.

29 “‘Caulking.—The vessel to be thoroughly caulked, both outside and ceiling; outside seams to be filled with paint instead of pitch.

“‘Spars, &c.—A full set of spars, pumps, &c., perfectly free from knots & sap, suitable for a vessel of her size.

“‘Iron-work.—All the iron-work for the hull and spars to be furnished by the builder, and to be of the best quality and workmanship.

“ Main-rail.—Main-rail to be four feet high from deck, to be five inches thick, and of suitable width.

“‘Poop.—Poop to be flush with main-rail, and extend six feet forward to the cabin poop-deck; to be white-pine, three inches thick, and four inches wide.

“‘Galley & Forecastle.—Galley and forecastle to be fitted and furnished to the satisfaction of Captain Nelson Edwards.

“‘Trunk-cabin.—A trunk-cabin to be built in the after part of poop, to the satisfaction of Captain Nelson Edwards.

“‘Windlass.—To be furnished with patent windlass, patent screw steering-apparatus, patent winches, capstan, patent gaws to gaffs, four patent deck-lights in stern, water-closet with tanks, chain-boxes, full set of trail and quarter boards, billet-head, carved work on stern, &c., Dantz chafing-plates, galvanized-iron plates, all necessary
30 plumbing-work, a full set of rail-boxes, side-skids, fenders, all at expense of builder.

“‘Joiner-work.—All out-board and in-board joiner-work complete, at expense of builder.

“‘Painting.—The vessel to have two coats of paint throughout on outside; deck to have one coat of varnish; cabin to be painted, grained, and varnished; carved-work to be gilded.

“‘Water-ways.—Water-ways of white-pine, to run the whole length of vessel, and to be of suitable size; bilge-streaks to be cross-fastened, and clamps to be square-fastened throughout.

“‘Bulwarks.—Bulwarks to be two and one-half inches thick, of white-pine, and of suitable width.

“‘Lumber-ports.—Lumber-ports to be of sufficient size to admit twenty-two-inch timber.

“‘Well.—Centre-board to be coppered inside up to seven feet from bottom of keel.

“‘Clamps.—To be two clamps, each one foot wide and five inches thick, to be placed one outside and the other inside of main-rail, and to be bolted through and through the stanchions, and through the
31 main-rail between stanchions.

"'LAUNCH.—The vessel to be launched and delivered safe in the water during the month of May, 1867, and to be light when delivered to

"'In order to more fully explain this contract, the hull, deck, and iron-work of this vessel is to be furnished by the carpenter at his own expense, complete to a cleat, and there is to be no charge for extra work in consequence of anything being omitted from the same.

[U. S. rev. stamp. 5 cents.]

"'LAUNCH.—All the work and materials used are to be the best and most approved description, to the satisfaction of Captain Nelson Edwards; and, in case of any disagreement, the build and finish of the schooner Carrie Holmes is to be considered a guide in the contract. The vessel, as she progresses, is to be insured at the expense of the builder, and policy assigned to Captain Nelson Edwards.

"'PAYMENTS.—Payments to be made by said parties of the second part to said party of the first part, viz: $2,500 when the keel is laid; $3,000 when the frame is all up; $3,500 when ceiled, deck-beams 32 in, kneed off, and deck laid; $3,500 when outside plank is on and squared off; $3,500 when poop-deck is on; $2,000 when ready for launching; balance when delivered according to contract; each individual owner to pay in proportion to the amount represented, which will be as follows, viz: Nelson Edwards, three-sixteenths, ($\frac{3}{16}$;) John A. Hasbrouck, one-fourth, ($\frac{1}{4}$;) D. Yoe, ($\frac{1}{16}$;) Baxter & Livingston, one-sixteenth, ($\frac{1}{16}$;) J. D. Higgins, ($\frac{1}{16}$;) Henry C. Jeroleman, ($\frac{1}{16}$;) David Ayers, ($\frac{1}{16}$;) Hopkings & Nelson, ($\frac{1}{16}$;) John J. Ward, ($\frac{1}{16}$;) R. E. Stillwell, ($\frac{1}{16}$;) J. M. Harlow, ($\frac{1}{16}$.) It is further understood and agreed between the said parties that, from time to time, as the several instalments herein provided to be paid are paid, by the said parties of the second part, and upon the payment of each instalment, the said schooner, so far as then constructed, and the materials therein inserted, shall be and become the property of the said parties of the second part. It is further understood and agreed that the builder, or party of the first part, is to forfeit and pay to the parties of the second part 33 $3,000 per month for every month the vessel may be detained on the ways after the 1st day of June, 1867.

"'In witness whereof the said parties have hereto set their hands and seals, the day and year above written.

	"'NELSON EDWARDS.	[L. S.]
	"'JOHN L. HASBROUCK.	[L. S.]
	"'BAXTER & LIVINGSTON.	[L. S.]
"'Witness—	"'R. E. STILWELL.	[L. S.]
FRED. HASBROUCK.	"'J. D. HIIGGINS.	[L. S.]
"'Witness to Ayers & Jeroleman—	"'DAVID AYERS.	[L. S.]
	"'HENRY C. JEROLEMAN.	[L. S.]
"'A. C. YEIBRUN.	"'HOPKINS & NELSON.	[L. S.]
	"'DENNIS YOE BY S. YOE.	[L. S.]
"'Witness to J. M. Harlow—	"'JOHN J. WARD.	[L. S.]
"'J. B. NEVIS.	"'J. M. HARLOW.	[L. S.]
	"'HENRY C. JEROLEMAN.	[L. S.]

"'*Assignment.*

"'In consideration of one dollar to me, the within-named Henry C. Jeroleman, paid by Nelson Edwards, within named, I do hereby assign, transfer, and set over to him, said Edwards, the original contract, (of

which the within is a copy,) and also all my rights and interest
34 and claims, under the same.

“‘And I do hereby authorize and request the party of the second part named in said contract to pay to said Edwards all moneys due me, or which may be due me, under said contract.

“‘And I do also authorize and empower said Edwards to take possession of said schooner John J. Ward, and complete the building of the same.

“‘And I do hereby release and discharge the said party of the second part from all claims and demands which I now or may have against them by reason of said contract on said schooner.

“‘In witness whereof I have set my hand and seal the 24th day of June, A. D. 1867.

“‘HENRY C. JEROLEMAN.

“‘Signed, sealed, and delivered in presence of—
“‘OSCAR Y. BABCOCK.

[U. S. rev. st'p, 50 cents.]

“‘STATE OF NEW JERSEY,
Hudson County, ss:

“‘I, George W. Cassidy, clerk of Hudson County aforesaid, do
35 hereby certify the foregoing (except the assignment) to be a true and correct copy of a certain contract as the same was filed in my office, November 22nd, A. D. one thousand eight hundred and sixty-six.

“‘Witness my hand and the seal of said county, this third day of March, A. D. one thousand eight hundred and sixty-nine, (1869.)
[L. S.] “‘GEORGE W. CASSIDY, *Clerk.*’

[U. S. rev. stamp, 5 cents.]

“8. And, likewise, that the original contract was filed in the clerk's office of the county of Hudson, on the 22nd day of November, 1866, and was assigned by said Jeroleman on the 24th day of June, 1867, to the defendant, Edwards, who completed the building of said vessel.

“9. And, likewise, that the original contract-price for constructing said vessel would have been about $21,000.00; that said Jeroleman was paid in excess of said price about $1,500.00.

“10. And, likewise, that said Jeroleman never paid any money
36 whatever on account of the construction of said vessel, and that the others of the party of the second part in said contract, have paid the whole cost of said vessel.

“11. And, likewise, that, said schooner was built in East Newark, in the county of Hudson, N. J., in the winter and spring of 1867.

“12. And, likewise, that at the time of the seizure of said schooner by said sheriff, to wit, June 19, 1867, the same was partially and primarily constructed, and was resting on her original stocks, and had never been launched into the water.

“13. And, likewise, that, at the said time, the said schooner had not a name, but that the name “John J. Ward” had been proposed as the name thereof, and that it is customary to *navy* vessels only at the instant of launching the same into the water for the first time.

“14. And, likewise, that at said time the said schooner had not been enrolled in the custom-house, nor licensed, nor measured.

37 “15. And, likewise, that at said time the said schooner had not a commander, and never had had one.

"But whether or not, upon the whole matter aforesaid, by the jurors aforesaid, found, the claims of the said plaintiffs were subsisting liens, under the laws of New Jersey, on the vessel named in the proceedings and papers of this case, at the time of exhibiting the same by them, the jurors aforesaid, are altogether ignorant, and therefore pray the advice of the supreme court before the justice thereof.

"And if, upon the whole matter aforesaid, it shall seem to the said court that the claims of said plaintiffs were subsisting liens under the laws of New Jersey, on the said vessel, at the time of exhibiting the same, then the jurors aforesaid, upon their oath, say that the plaintiffs have a right of recovery on said bond to the amount of their said claims as damages, and in that case they assess the damages of the plaintiff Elliott by reason of the matters aforesaid over and above
38 his costs and charges, by him about his suit in that behalf expended, to $261.67, and the damages of David Ripley and the other plaintiffs, by the reason of the matters aforesaid, besides their costs and charges, by them about their suit in that behalf expended, to $2,841.43, and for the costs and charges of all the plaintiffs to six cents.

"But if, upon the whole matter aforesaid, it shall seem to the court that the claims of the said plaintiffs were not subsisting liens on said vessel under the laws of New Jersey at the time of exhibiting the same, then the jurors aforesaid, upon their said oaths, say that the claims of said plaintiffs were not subsisting liens on said vessel at the time of the exhibition thereof, that then the bond of the said defendants is not forfeited, and the plaintiffs have no right of recovery against the said defendants the sums demanded by them, and that in that case the
39 verdict should be for the defendants."

But because our said court now here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid until the seventh day of November, A. D. eighteen hundred and seventy-one, to hear the judgment of the said court thereupon.

At which day, before our said court, at Trenton, aforesaid, come the parties aforesaid, by their attorneys aforesaid, whereupon all and singular the premises being seen, and by the court now here fully understood, and mature deliberation being thereupon had upon the whole matters aforesaid, and the court being of opinion that the claims of said plaintiffs are subsisting liens under the laws of New Jersey, on the said vessel—

It is considered that the said George Elliott do recover against the said Nelson Edwards, Charles A. Woolsey, and George Collins, by reason of the matters aforesaid, his said damages over and above his
40 costs and charges by him about his suit in that behalf expended, and now here assessed to two hundred and sixty-one dollars and sixty-seven cents; and that the said David Ripley, William A. Ripley, Charles O. Ripley and John W. Ripley, do recover against the said Nelson Edwards, Charles A. Woolsey, and George Collins aforesaid, by reason of the matters aforesaid, their said damages over and above their costs and charges by them about their suit in that behalf expended, and now here assessed to two thousand eight hundred and forty-one dollars and forty-three cents; and also   , for their costs and charges aforesaid, by the court now here adjudged to the said plaintiffs, and with their assent; which said damages, costs, and charges in the whole amount to   .

Judgment signed this ninth day of November, A. D. eighteen hundred and seventy-one.

M. BEASLEY, *Ch. Jus.*

41 I, Charles P. Smith, clerk of the supreme court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment in the above-stated cause, as the same remains of record in my office.

In testimony whereof I have hereto set my hand and the seal of said court, at Trenton, this eighth day of March, A. D. eighteen hundred and seventy-two.

[L. S.] CHA'S P. SMITH, *Cl'k.*

42 New Jersey court of errors and appeals of the term of November, A. D. 1871. In error to the supreme court.

NELSON EDWARDS ET AL., PL'T'FFS IN ERROR, *vs.* GEO. W. ELLIOTT ET AL., DEF'TS IN ERROR.	Assignment of errors.

Afterwards, to wit, at the term aforesaid, before the court aforesaid, at Trenton, came the plaintiffs in error, by Abraham S. Jackson, their attorney, and say that, in the record and proceedings aforesaid, and also in giving the judgment aforesaid there is manifest error in this, to wit:

1. That the said supreme court held that the act entitled "An act for the collection of demands against ships, steamboats, and other vessels," approved March 20, 1857, was valid and constitutional; whereas the same is not valid and constitutional.

2. And there is also error in this, to wit, that the said supreme court decided that Nathaniel Ellis and Henry Jeroleman, the builders of said vessel, were the owners thereof and competent to charge it with liens; whereas, by law and in fact, they were not owners of said vessel, and not competent to charge it with liens.

And there is also error in this, to wit, that the said supreme 43 court adjudged that the respective claims of the plaintiffs were subsisting liens, under the laws of the State of New Jersey, on the said vessel, at the time of exhibiting the same; whereas, by said laws, the said claims were not subsisting liens on the said vessel at the said time.

4. And there is also error in this, to wit, that the supreme court ordered that judgment should be entered herein for the plaintiff Elliott, for the sum of $261.67, and for the plaintiffs David, William, Charles, and John, for the sum of $2,841.42, and that they should have execution thereof, respectively, with costs; whereas judgment herein should have been ordered for the defendants.

And the plaintiffs in error pray that the judgment of the supreme court, for the errors aforesaid, and for other errors in the said record and proceedings being, may be reversed, annulled, and altogether holden for naught; and that they may be restored to all things that they have lost by reason of said judgment, &c.

A. S. JACKSON,
Att'y for and of Counsel with the Plaintiffs in Error.

44 (Indorsed:) N. J. court of errors & appeals. In error to the sup. c't. Nelson Edwards et al., pl't'ffs in error, vs. George W. Elliott et al., def'ts in error. Assign. of errors. A. S. Jackson, att'y. Filed February 12, 1872. Henry Kelsey, cl'k.

45 New Jersey court of errors and appeals of the term of November, A. D. 1871. In error to the supreme court.

GEORGE W. ELLIOTT ET AL., DEF'TS IN ERROR,
ads.
NELSON EDWARDS ET AL., PL'FFS IN ERROR.
} Joinder in error.

And hereupon the defendants in error, by Alexander T. Compton, their attorney, come into the said court, and say that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid.

And they pray that the said court of errors and appeals may proceed to examine, as well the record and proceedings aforesaid, as the matter aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

A. T. COMPTON,
Att'y for and of Counsel with the Def'ts in Error.

46 (Indorsed :) N. J. court of errors & appeals. In error to the sup. c't. George W. Elliott et al., def'ts in error, ads. Nelson Edwards et al., pl't'ffs in error. Joinder in error. A. T. Compton, att'y. Filed February 19, 1872. Henry C. Kelsey, cl'k.

47 N. J. court of errors and appeals June term, A. D. 1872. In error to the sup. c't.

GEORGE W. ELLIOTT, DAVID RIPLEY, WILliam A. Ripley, Charles O. Ripley, and John W. Ripley, def'ts in error,
ads.
NELSON EDWARDS, CHARLES A. WOOLSEY, and George Collins, pl'ffs in error.
} **Rule to affirm.**

This cause coming on to be heard in the presence of the counsel of both parties, and the court having read and inspected the record and the errors assigned for the reversal of the judgment of the supreme court, and having heard the arguments of counsel and duly considered the same; and the court being of opinion that the act of the legislature of the State of New Jersey, entitled, "An act for the collection of demands against ships, steamboats, and other vessels," approved March 20, 1857, is not in any respect repugnant to the Constitution or laws of the United States, as contended for by the plaintiffs in error, but is, in every respect, valid and constitutional; and that Nathaniel Ellis and Henry Jeroleman, the builders of the said vessel, were the owners thereof and competent to charge it with liens; and that the
48 respective claims of the defendants in error were subsisting liens,
under the laws of the State of New Jersey, on the said vessel; and that the contract for building said vessel, set out in the special verdict herein, is not a maritime contract, and the statutory remedy thereon, to wit, the aforementioned act, does not conflict with the Constitution or laws of the United States; and that the said act does not violate the right of trial by jury, nor conflict with the constitution of the State of New Jersey in that behalf; and that there is no error in the proceedings of the supreme court herein, and their judgment in the same.

It is thereupon, on this twentieth day of August, A. D. 1872, ordered,

adjudged, and determined by the court here, that the said act of the legislature of the State of New Jersey, is not, in any respect, repugnant to the Constitution or laws of the United States, and that the judgment of the supreme court be in all things affirmed, and that the defendants in error do recover their costs in this court to be taxed.

On motion of—

A. T. COMPTON,
Att'y for Def'ts in Error.

(Indorsed:) N. J. court of errors & appeals, June term, 1872. In error to sup. c't. Geo. W. Elliott, David Ripley, W'm, Cha's O., & John W. Ripley, def'ts in error, ads. Nelson Edwards, Cha's A. Woolsey, & Geo. Collins, pl't'ffs in error. Rule to affirm.

49 Know all men by these presents that we, Nelson Edwards, John R. Halladay, of Jersey City; and John Van Boskirk, of the city of Bayonne, in the county of Hudson, and State of New Jersey, are held and firmly bound unto George W. Elliott, David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, of the city of Newark, in the county of Essex, and State of New Jersey, in the sum of six thousand two hundred and six $\frac{20}{100}$ dollars, lawful money of the United States of America, to be paid to the said obligees, their executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the twelfth day of August, one thousand eight hundred and seventy-two.

Whereas by a judgment of the court of errors and appeals of the State of New Jersey, signed on the day of August instant, of the term of June last, in a certain cause, moved therein from the supreme court of the said State, wherein Nelson Edwards aforesaid, Charles A.
50 Woolsey, and George Collins, were plaintiffs in error, and the obligees herein were defendants in error, the judgment of the said supreme court, in favor of the said defendants in error, who were the plaintiffs below, in the respective sums of $261.67 and $2,841.43, was in all things affirmed.

And whereas the said Edwards, Woolsey, and Collins, in order to obtain a reversal of the same, have sued out a writ of error thereon to the Supreme Court of the United States, and have obtained a citation on the same:

Now, therefore, the condition of this obligation is, that if the said Nelson Edwards, Charles A. Woolsey, and George Collins shall prosecute their said writ of error to effect, and shall answer all damages and costs if they fail to make their plea good, then this obligation shall be void; else to remain in full force.

NELSON EDWARDS. [L. S.]
JOHN R. HALLADAY. [L. S.]
JOHN VAN BOSKIRK. [L. S.]

Executed and delivered in the presence of—
ISAAC ROMAINE.

STATE OF NEW JERSEY, *ss:*

John R. Halladay, being duly sworn, on his oath says that he is one of the within-named obligors; that he resides at Jersey City, in said State; that he is worth at least six thousand two hundred and

51 fifty dollars, in real estate, in said State, after all his debts and liens thereon are paid.

JOHN R. HALLADAY.

Sworn and subscribed before me August 12, 1872, at Jersey City.

ISAAC BOMAINE,
Sup. C't Com'ss. State of N. J.

STATE OF NEW JERSEY, *ss:*

John Van Boskirk, being duly sworn, on his oath says that he is one of the within-named obligors; that he resides at the city of Bayonne, in said State; that he is worth at least six thousand two hundred and fifty dollars, in real estate, in said State, after all his debts and the liens thereon are paid.

JOHN VAN BOSKIRK.

Sworn and subscribed before me August 12th, 1872, at Jersey City.

ISAAC ROMAINE,
Sup. C't Com'ss.

52 (Indorsed:) Dated August 12, 1872. Nelson Edwards et al. to George W. Elliott et al. Bond in error. $6,206.20. I approve the within bond and the obligors within named. A. O. Zabriskie, pres. of court of errors & appeals. Filed August 20, 1872. Henry C. Kelsey, clerk.

53 N. J. court of errors and appeals. June term, 1872. In error to the sup. c't.

NELSON EDWARDS, CHARLES A. WOOLSEY, and George Collins, pl'ffs in error, *vs.* GEORGE W. ELLIOTT, DAVID RIPLEY, William A. Ripley, Charles O. Ripley, and John W. Ripley, def'ts in error.	Rule of allowance & return.

A writ of error having been allowed to remove the judgment of this court, in this cause, to the Supreme Court of the United States—

It is ordered that a return thereto be made according to law.

Dated August 20, 1872.

On motion of—

A. S. JACKSON,
Att'y for Pl'ffs in Error.

(Indorsed:) N. J. court of errors & appeals. June term, 1872. In error to the sup. court. Nelson Edwards, Charles A. Woolsey, & George Collins, pl'ffs in error, vs. Geo. W. Elliott, David Ripley, William A. Ripley, Charles O. Ripley, & John W. Ripley, def'ts in error. Rule of allowance & return.

54 UNITED STATES OF AMERICA, *ss:*

To George W. Elliott, David Ripley, William A. Ripley, Charles O. Ripley, and John W. Ripley, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of our court of errors and appeals, wherein Nelson Edwards, Charles A. Woolsey, and George Collins are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Abraham O. Zabriskie, president of our said court of errors and appeals, at Trenton, the twelfth day of August, A. D. 1872.

[SEAL.] A. O. ZABRISKIE,
Pres. of the Court of Errors and Appeals aforesaid.

Attest:
HENRY C. KELSEY, *Clerk.*

(Indorsed:) U. S. Supreme Court. Nelson Edwards et al., pl'ffs in error, vs. George W. Elliott et al., def'ts in error. Citation on writ of error. Ret'ble Dec'r term, A. D. 1872. A. S. Jackson, att'y. Filed November 26, 1872. Henry C. Kelsey, cl'k.

We acknowledge service of the within citation on us, on the 28th day of October, 1872.

A. Q. KEASBEY.
By E. Q. KEASBEY,
Att'y for & of Counsel with the Def'ts in Error.

I acknowledge service of the within citation on me, on the 30th day of October, 1872.

A. T. COMPTON,
Att'y for Def'ts in Error.

In presence of—
A. S. JACKSON.

55 [Affidavit of service. J. W. Harrison, stationer and printer, 16 Exchange Place, Jersey City, N. J.

United States of America.

STATE OF NEW JERSEY,
County of Hudson, ss:

Abraham S. Jackson, of No. 133 Wayne st., Jersey City, in said county, being duly sworn, on his oath says that he did, on the twenty-eighth day of October, 1872, serve the citation hereunto annexed, on the defendants in error therein named, by leaving a true copy thereof on said day, at the office of Anthony Q. Keasbey, their counsel, in the city of Newark, in said State, and by giving a like copy personally to Alexander T. Compton, their attorney, at his office, No. 45 Pine st., in the city of New York, and showing him the seal on the original citation, on the 30th day of said October.

A. S. JACKSON.

Sworn and subscribed this 26th day of November, A. D. 1872, before me, at Jersey City, as witness my hand and seal of office hereto set.

[SEAL.] ISAAC ROMAINE,
Notary Public N. J.

56 I, Henry C. Kelsey, clerk of the court of errors and appeals, of the State of New Jersey, do hereby certify that the foregoing is a true copy of the judgment of affirmance, in the above-stated cause, (except the citation, which is original,) and of the record and proceedings therein, with all things concerning the same, as the same remain of record in my office.

In testimony whereof I have hereto set my hand and the seal of my office, (the same being the seal of said court,) this 26th day of November, A. D. 1872.

[SEAL.]

HENRY C. KELSEY, *Clerk.*

(Indorsement on cover:) No. 559. Nelson Edwards, Charles A. Woolsey, and George Collins, plaintiffs in error, vs. George W. Elliott, David Ripley, W'm A. Ripley, Cha's O. Ripley, and John W. Ripley. New Jersey court of errors & appeals. Filed 6th December, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 62.

NELSON EDWARDS, CHARLES A. WOOLSEY, & GEORGE COLLINS, PLAINTIFFS IN ERROR,

VS.

GEORGE W. ELLIOTT, DAVID RIPLEY, W'M A. RIPLEY, ET AL.

CERTIORARI AND RETURN.—FILED 6TH AUGUST, 1874.

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1 THE UNITED STATES OF AMERICA:

[SEAL.] The President of the United States of America to the honorable the judges of the court of errors and appeals of the State of New Jersey, greeting:

Whereas in a certain suit in the said court of errors and appeals, in
which Nelson Edwards, Charles A. Woolsey, and George Collins were
plaintiffs, and George W. Elliott, David Ripley, William A. Ripley,
Charles O. Ripley, and John W. Ripley were defendants, which suit
was removed by writ of error to the Supreme Court of the United States,
agreeably to the act of Congress in such case made and provided, it is
suggested that a certain rule to affirm the judgment of the supreme
court of the State of New Jersey, made by the said court of errors and
appeals on the twentieth day of August, eighteen hundred and seventy-
two, appearing in the transcript of the record and proceedings in said
suit filed in the said Supreme Court of the United States, has been va-
cated and set aside by the said court of errors and appeals, and an
amended rule substituted therefor since the filing of said transcript: You,
therefore, are hereby commanded that you certify under your seal
2 forthwith to the said Supreme Court any rule entered by the said
court of errors and appeals in the said suit subsequent to the en-
tering of the said rule to affirm, by which the said rule to affirm has
been in anywise corrected or vacated, and any such rule which has been
substituted for said rule to affirm, plainly and distinctly, and in as full
and ample a manner as the same now remains before you, together with
this writ, so that the said Supreme Court of the United States may be
able thereon to proceed and to do what shall appear to them of right
ought to be done. Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the said

Supreme Court, the twenty-fifth day of May, eighteen hundred and seventy-four.

D. W. MIDDLETON,
Clerk Supreme Court.

(Indorsed:) Supreme Court of the United States. Nelson Edwards & others, vs. George W. Elliott, David Ripley, & others. Certiorari to the court of errors & appeals of the State of New Jersey. A. Q. Keasbey, att'y of deft's in error.

3 *Rule to affirm.*

New Jersey court of errors and appeals, June term, 1872.

NELSON EDWARDS, CHARLES A. WOOLSEY, and George Collins, plaintiffs in error,
vs.
GEORGE W. ELLIOTT, DAVID RIPLEY, William A. Ripley, Charles O. Ripley, and John W. Ripley, defendants in error.

In debt. In error to Supreme Court.

This cause coming on to be heard in the presence of the counsel for both parties, and the court having read and inspected the record, and the errors assigned for the reversal of the judgment of the Supreme Court, and having heard the arguments of counsel and duly considered the same, and the court being of opinion that Nathaniel Ellis and Henry Jerolemon, the builders of the vessel in the declaration of the plaintiffs below-mentioned, were the owners of the said vessel
4 at the time when the materials were furnished by said plaintiffs,
within the meaning of the act of the legislature of New Jersey, entitled, "An act for the collection of demands against ships, steamboats, and other vessels," and as such owners, were competent to charge it with liens for such materials; and that respective claims of the defendants in error were subsisting liens upon said vessel under the said act; and that the said act does not conflict with the constitution of the State of New Jersey by violating the right of trial by jury. It is thereupon on this twentieth day of August, eighteen hundred and seventy-two, ordered, adjudged, and determined by the court here, that the judgment of the supreme court be affirmed, and that the defendants in error do recover their costs in this court to be taxed.

On motion of—

A. T. COMPTON,
Att'y of Deft's in Error.

To be entered nunc pro tunc in pursuance of order of April 1, '74.

5 *Rule to set aside rule entered August 20, 1872.*

New Jersey court of errors and appeals.

NELSON EDWARDS, CHARLES A. WOOLSEY, and George Collins, plaintiffs in error.
vs.
GEORGE W. ELLIOTT, DAVID RIPLEY, William A. Ripley, and Charles O. Ripley, and John W. Ripley, def'ts in error.

In error to Supreme Court.

It appearing to the court upon the suggestion of the counsel of the defendants in error in the above-stated case, that the rule to affirm the judgment of the supreme court therein entered in the minutes of this court on the twentieth day of August, eighteen hundred and seventy-two, was erroneously entered by the attorney of the plaintiffs in error, and does not correctly express the judgment of this court as set forth in the opinion of the court delivered in this cause, it is ordered 6 on this first day of April, 1874, after due notice to the attorney of the said plaintiffs and hearing argument thereon, that the said rule to affirm be wholly annulled and stricken from the minutes; and that a rule to affirm the said judgment of the supreme court be entered by the attorney of the defendants in error in conformity with the decision of the court on the questions before it.

On motion of—

A. T. COMPTON,
Att'y of Def'ts in Error.

7 STATE OF NEW JERSEY:

I, Henry C. Kelsey, secretary of state of the State of New Jersey, and ex-officio clerk of the court of errors and appeals in the last resort in all causes, &c., do hereby certify the foregoing to be true copies of orders made in the above stated cause, as the same are taken from and compared with the minutes of said court.

In witness whereof I have hereunto set my hand and affixed my official seal this second day of June, A. D. 1874.

[SEAL.] HENRY C. KELSEY.

(Indorsed:) N. J. court of errors and appeals. Nelson Edwards et als. v. George W. Elliott, et als. Copy of order.

8 STATE OF NEW JERSEY:

In obedience to the writ of certiorari annexed hereto issued by the Supreme Court of the United States on the twenty-fifth day of May, eighteen hundred and seventy-four, the annexed copies of all the rules entered by the court of errors and appeals in the suit referred to in said writ, subsequent to the entry of the rule to affirm the judgment of the supreme court, herein also mentioned, and remaining of record in this court are hereby certified and sent to the said Supreme Court of the United States, as in the said writ directed.

Witness the honorable Theodore Runyon, chancellor of the State of New Jersey, and presiding judge of the said court of error and appeals, the fifth day of August, eighteen hundred and seventy-four.

[SEAL.] HENRY C. KELSEY.

(Indorsed:) 1874. October term. Supreme Court of the United States. No. 62. Nelson Edwards & others vs. George W. Elliott, David Ripley, & others. Return of certiorari by the court of errors and appeals of the State of New Jersey. Filed 6th August, 1874.

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Supreme Court of the United States.

IN ERROR.

NELSON EDWARDS ET AL.

vs.

GEORGE W. ELLIOTT ET AL.

Points and Brief of A. Q. Keasbey,

For Defendants.

Holbrook, Printer, 11 Mechanic-st., Newark, N. J.

Supreme Court of the United States.

NELSON EDWARDS, CHARLES A. WOOLSEY and GEORGE COLLINS, *Plaintiffs in Error*,
vs.
GEORGE W. ELLIOTT, DAVID RIPLEY, WILLIAM A. RIPLEY, JOHN W. RIPLEY and CHARLES O. RIPLEY, *Defendants in Error*.
} *In Error*.

Points and Brief of A. Q. Keasbey, of Counsel for Defendants in Error.

STATEMENT.

This was an action of debt on a bond given by the plaintiffs in error to the defendants in error, dated July 2, 1867, under the provisions of the Act of the Legislature of New Jersey, entitled "An Act for the collection of demands against ships, steamboats and other vessels," approved March 20, 1857. (Nixon's Digest, p. 576.)

A copy of the bond will be found in the printed case, pp. 4, 5.

The Act provides that whenever a debt shall be contracted by the master, owner, agent or consignee of any ship or vessel within the state, on account of any work done or materials furnished in this state for or towards the building, repairing, furnishing or equipping such ship or vessel, such debt should be and continue a lien on the vessel for nine months, and any person having such claim over twenty dollars may apply to the proper officer for a warrant to enforce his lien; that the officer receiving the warrant may seize the vessel and give the prescribed notice; that any other person having such lien may make proper demand and proof and be admitted as an attaching creditor; that the owner or any party may at any time before sale apply for her discharge upon giving bond to pay such claims as shall be established to have been subsisting liens under the Act; that upon such bond being given the vessel shall be discharged, and the creditors may sue upon the bond alleging their claims and averring them to be subsisting liens, and that if no such bond is given, proceedings may be taken as provided in the Act for the sale of the vessel or such part of her tackle, etc., as shall be sufficient to pay the claims.

The defendants in error having such claims against a new vessel on the stocks in Hudson county, not yet launched, and intended to be named the John J. Ward, for work and materials used in building her, pursued the course prescribed, and caused the vessel to be seized while yet on the stocks. The plaintiffs in error claiming as her owners, gave the bond and procured her discharge.

The claim of George W. Elliott was for $201.70 for materials used in her keel, and that of David Ripley & Sons for $2244.46 for timber used in her construction, between January 15, 1867, and May 10, 1867, which claims were alleged in the declaration on the bond to be subsisting liens.

This declaration was demurred to on the ground that the Act of the Legislature assumed control over maritime contracts over which the Federal courts alone have jurisdiction, and was therefore unconstitutional.

This demurrer was overruled and the contract for building a ship on land was held by the Supreme Court to be *not* a maritime contract, and therefore not unconstitutional.

The opinion of the Court delivered November Term, 1869, and reported in 5th Vroom, p. 96, is as follows:

"VAN SYCKEL, J. This is a suit upon a bond given under the twelfth section of the act entitled 'An act for the collection of demands against ships, steamboats, and other vessels.' *Nix. Dig.* 576.

"The declaration alleges that the debt was contracted in building a vessel at the ship-yard in East Newark, in this state, and the lien put upon the vessel while lying in the yard and before it was finished.

"The defendants have demurred to the declaration, and insist that the act above referred to, by creating a lien under state law, assumes control of maritime contracts, over which the federal courts have exclusive jurisdiction, and is therefore void.

"The District Court derives its powers from Article three, section two, of the constitution of the United States, which provides that 'the judicial power shall extend to all cases of admiralty and maritime jurisdiction;' and from the judiciary acts of 1789 and 1845.

"The act of 1789, under which the District Courts exercise jurisdiction over waters navigable from the sea, among other things, declares that the District Courts shall have exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it. The act of 1845 gives the District Courts jurisdiction over maritime causes arising on the lakes and the waters connecting those lakes, saving to the state courts not only the common law remedy, but any concurrent remedy which may be provided by state laws.

"The extensive control of the federal courts over maritime affairs is not disputed, but the precise effect of the saving clauses in the judiciary acts of 1789 and 1845 has given rise to much discussion, and has not until recently been clearly defined.

"In the case of the Moses Taylor, reported in 4 *Wallace* 411, a proceeding *in rem* was instituted in a state court against the steamship Moses Taylor, owned in New York, and engaged in navigating the Pacific ocean, for an alleged breach of contract to furnish proper food during the voyage. Judgment was given against the vessel, and upon appeal taken to the Supreme Court of the United States, Justice Field, who delivered the opinion of the court, denying jurisdiction in the state court, held that the saving clause in the act of 1789 only saves to suitors the right of a common law remedy, where the common law is competent to give it; that it is not a remedy in the common law courts which is saved, but a common law remedy, and that in all other cases the federal jurisdiction is exclusive. The same doctrine is more fully announced in *The Hine* v. *Trevor*, in 4 *Wallace* 555.

"In the Moses Taylor, and also in the *Hine* v. *Trevor*, admiralty had jurisdiction by its appropriate proceeding *in rem*, and there was, therefore, manifest propriety in excluding the state courts.

"But in cases where the federal courts have no power to proceed *in rem*, there being no danger of a conflict of authority under the two jurisdictions, no good reason appears why the state courts may not be permitted to enforce their statutory liens until the exclusive power to proceed *in rem* to enforce liens created by state law is extended by act of Congress to the District Courts. Since the amendment of the twelfth rule of admiralty in December Term, 1858, the District Courts have refused to enforce liens *in rem*, where they rested sorely on state statutes. In such cases, the only objection which can be perceived to the pursuit of the lien in state courts is, that it might give their suitors some advantage over those who proceed *in personam* in the federal courts.

"The saving clause of the act of 1789 does not expressly discriminate in favor of the state courts where admiralty cannot proceed *in rem*, and that, no doubt, led the Court in the cases cited, to lay down the rule in terms sufficiently broad to restrict the state courts to common law remedies in all cases of maritime contracts. It is not necessary, however, for the decision of this case, to express an opinion upon this question.

"Under the interpretation of the rule given in the cases cited, if the contract set forth in the plaintiff's declaration is a maritime contract, the power of the state courts to proceed *in rem* is excluded, for that is a remedy unknown to the common law.

"In the *Peoples Ferry Company* v. *Beers*, 20 *How.* 393, the Supreme Court of the United States has decided that a contract for building a ship is not a maritime contract. The same view was taken by Judge Grier in *Roach* v. *Chapman*, 22 *How* 129, and it has been adopted in the more recent case of *The Belfast*, reported in 7 *Wallace*, 624.

"The ship, when completed, was to be used for maritime purposes, but, until then, was a building entirely under state control, and it is therefore competent for the state courts to enforce the contract, either by common law remedy, or by any new remedy which the legislature may have provided.

"So far, however, as the state law in question is designed to aid in the enforcement of a maritime contract for which admiralty may proceed *in rem*, it is clearly in conflict with the constitution and laws of the United States, and therefore void.

"The demurrer must be overruled, and judgment entered for the plaintiffs."

The defendants in the action did not bring a writ of error to the Court of Errors and Appeals, the highest court of the state, but asked leave to withdraw the demurrer, and filed the following pleas:

1. Non est factum.
2. Nil debet generally.
3. Nil debet as to Elliott.
4. Nil debet as to Ripleys.
5. Claim of Elliott not a subsisting lien
6. Claim of Ripley not a subsisting lien.
7. That Ellis & Jeroleman, who built the vessel, were not owners or agents.
8. That the debts were not contracted by any owner, agent or consignee.
9. That there was no such vessel called the John J Ward.

Issues were joined on these pleas and a special verdict found which is recited in the printed case, p. 9.

Upon this special verdict the Supreme Court directed a judgment for the plaintiffs in the action.

The formal judgment is found on p. 14 of the case and is as follows, after reciting the special verdict:

"Whereupon all and singular the premises being seen and by the Court now here fully understood and mature deliberation being thereupon had upon the whole matters aforesaid, and the Court being of opinion that the claims of the plaintiffs are subsisting liens, under the laws of New Jersey, on the said vessel,—It is considered that the said George W. Elliott, &c., do recover against the said Nelson Edwards, &c., the sum of $261.67, and that the said David Ripley &c., do recover, &c, the sum of $2841 43 with costs, &c."

The opinion of the Supreme Court on which this judgment was founded is reported in 6 Vroom, 265, and is as follows:

"GEORGE W. ELLIOTT ET AL. *v.* NELSON EDWARDS ET AL.

"1. In the case of an executory contract to build a vessel, to be paid for in installments as the work progresses, the title remains in the builder until the work is completed and delivered.

"2. By the express undertaking of the parties in this case, when an installment was paid, the vessel, so far as then constructed, was to become the property of the purchaser, but the burden was on him to show that his title vested before the lien, for which this suit was brought, attached.

"This suit was on a bond given by defendants for payment of a debt contracted in building a vessel in East Newark, in this State, which debt is a lien on the vessel, according to the statute entitled 'An act for collection of demands against ships, steamboats, and other vessels.' *Nix. Dig.* 576.

"The declaration was demurred to, on the ground that the act referred to, by creating a lien under State law, assumes control of maritime contracts, over which the Federal courts have exclusive jurisdiction, and is, therefore, void.

"The demurrer was overruled, and judgment ordered for the plaintiff, at November Term, 1869. (See 5 *Vroom*, 96.) The demurrer having been withdrawn, an issue made by the pleadings was tried at the Hudson Circuit, and a special verdict rendered by the jury, the principal facts of which are set forth in the following opinion of the court.

"The material question raised by the verdict was, whether the claims of the plaintiffs were subsisting liens upon the vessel at the time they were exhibited.

"The case was argued at June Term, 1871.

"For plaintiffs, *A. Q. Keasbey.*

"For defendants, *A S. Jackson*, and *J. F. Randolph*.

"The opinion of the court was delivered by

"VAN SYCKEL, J. The plaintiffs, who claim to have liens on a vessel built at East Newark, in this State, instituted this suit for the recovery thereof, on a bond given under the twelfth section of the act entitled 'An act for the collection of demands against ships, steamboats, and other vessels.' *Nix. Dig.* 576.

"The material facts upon which the validity of the liens rests are established by the special verdict rendered at the Circuit. The question in the cause is, whether the claims of the plaintiffs were subsisting liens upon the vessel at the time they were exhibited.

"Every debt contracted by the master, owner, agent, or consignee of any ship or vessel within this State, for materials used in its construction, is within the protection of the act.

"By the opinion of this court, delivered in November Term, 1869, when this cause came up on demurrer, it was held that this was not a maritime contract, and that, therefore, it was competent for our State courts to enforce it by common law remedy, (5 *Vroom* 96,) or by any new remedy which the Legislature may have provided. The principal defence set up in avoidance of these claims, and the only one which it is deemed necessary to notice, is, that the parties who incurred the debt did not occupy to the vessel the relation either of master, owner, agent, or consignee.

"The vessel was built partly by Jeroleman & Ellis, under articles of agreement concluded November 3d, 1866, between Henry C. Jeroleman, of the first part, and Nelson Edwards, Henry C. Jeroleman, and others, of the second part.

"By the terms of this agreement, all the materials were to be found, and the work done, by the builders, and payments were to be made by the parties of the second part to the parties of the first part, at stated periods during the progress of the work; and it was expressly stipulated, that from time to time, as the several installments therein provided to be paid were paid by the parties of the second part, the said vessel, so far as then constructed, and the materials therein inserted, should be and become the property of the parties of the second part. On the 24th day of June, 1867, after the plaintiffs had furnished their materials to Ellis & Jeroleman, the original contract for building the vessel was assigned by Jeroleman to Nelson Edwards, who completed the work.

"The English cases before the Revolution uniformly hold that where a builder agrees to furnish the materials and build a vessel or other thing not *in esse*, to be paid for in installments, as the work progresses, it is a contract for work and materials, and not a contract of sale, and that the title remains in the builder until the work is completed and delivered.

"In *Mucklow* v. *Mangles*, 1 *Taunt.* 318, where the whole price was paid in advance, and the name of the person for whom the vessel was built was painted on her, the title was held to remain in the builder.

"In *Towers* v. *Osborn*, the defendant set up the statute of frauds in aid of his refusal to take a chariot which was built for him upon his verbal order, but Chief Justice Pratt ruled that it was not a contract for the sale of goods, and the plaintiff had recovery.

"This case was followed by Lord Ellenborough in *Groves* v. *Buck*, 3 *M. & S.* 178, and was not departed from until a different doctrine was announced *Woods* v. *Russell*, 5 *Barn. & Ald.* 942, in 1822; and in some of the English cases since that date, which have recognized *Woods* v. *Russell* as authority, it is acknowledged that it is difficult to reconcile that case with established principles.

"The New York and Massachusetts cases are in full accord with the early English cases. *Merritt* v. *Johnson*, 7 *Johns.* 473; *Gregory* v. *Stryker*, 2 *Denio*, 628; *Johnson* v. *Hunt*, 11 *Wend.* 139; *Andrews* v. *Durant*, 11 *N. Y.* 35; *Miscer* v. *Howarth*, 21 *Pick* 205; *Spencer* v. *Cane*, 1 *Met.* 283.

"These cases have been followed in our own State in the recent case of *The West Jersey R. R. Co.* v. *The Trenton Car Works*, 3 *Vroom*, 517, which declares the rule to be that in the case of an executory contract for the sale of an article not in existence, but to be manufactured, and where the contract price is advanced, no title passes until the thing is completely finished and delivered, or set apart for and accepted by the orderer.

"In the absence of any special contract to the contrary, the title to the vessel would have continued in the builder until it was completed and delivered, but by the express undertaking of the parties, when an installment was paid, the vessel, so far as then constructed, and the materials therein inserted, were to be and become the property of the persons making such payments. The title being originally in the builders, the burden was on the defendants to show that such title was divested before the plaintiffs furnished the materials. This the defendants have failed to show, and, therefore, the builders at that time must be regarded as the owners of the vessel, and as competent to charge it with liens.

"The result is, that the plaintiffs are entitled to recover."

This judgment was removed to the highest court by writ of error.

The assignment of errors was as follows:

1. That the Supreme Court held the Act valid and constitutional, whereas it was not.

2. That the Court held that Ellis & Jeroleman were owners and competent to charge it with liens.

3. That the Court held that the claims were subsisting liens.
4. That judgment was entered for the plaintiffs instead of for the defendants.

At the Term of June, 1872, the Court of Errors affirmed the judgment of the Supreme Court.

The opinion of the Court of Errors as reported in 7 Vroom, page 449, is as follows :

"NELSON EDWARDS ET AL. *v.* GEORGE W. ELLIOTT.

"1. In an executory contract to build a vessel to be paid for in instalments, as the work progresses, the title remains in the builder until the work is completed and delivered.

"2. Where by the terms of the contract, when an instalment was paid, the vessel, so far as then constructed, was to become the property of the purchaser—*Held*, that the burden is on him to show the time of payment and that his title vested before the lien attached.

"3. The act for the collection of demands against ships, steamboats, and other vessels, (*Nix. Dig.* 576,) does not conflict with the constitution of New Jersey, by violating the right of trial by jury.

"In error to the Supreme Court.

"For former proceedings in this case, see 6 *Vroom*, 265.

"An article of agreement was made November 3d, 1866, between Henry C. Jeroleman of the first part, and Nelson Edwards and others of the second part, for building a schooner of specified dimensions, materials, and finish, for the consideration of $54 per ton ; the builder to furnish all labor and materials and deliver the vessel in May, 1867. The payments were to be made as follows : $2500 when the keel was laid ; $3000 when the frame was all up ; $3500 when ceiled, deck beams in, kneed off and decks laid ; $3500 when outside planks were on and squared off ; $3500 when the poop deck was on ; $2000 when ready for launching, and the balance when delivered according to contract. And it was agreed that as the said several instalments were paid, and upon the payment of each instalment, the schooner, so far as then constructed, and the materials therein inserted, should be and become the property of said Edwards and others

"The schooner was built at East Newark, Hudson county, N. J., in the winter and spring of 1872. Charles Elliott, and David Ripley and others, defendants in error, furnished timber for the vessel, and June 19th, 1867, caused the same to be seized by the sheriff, under 'An act for the collection of demands against ships, steamboats and other vessels, approved March 20th, 1857, and supplement.' *Nix. Dig.* 576–81.

"At the time of the seizure, the schooner was unfinished upon the stocks, and had not been launched, nor named, enrolled or licensed.

"July 2d, 1867, the defendants below, Edwards, Woolsey, and Collins, gave bond to Elliott, Ripley and others, lien claimants, for $4894.32, under section 12 of the above act, and the vessel was discharged from seizure.

"Elliott's bill was $201.70, for chestnut timber furnished in November, 1866. Ripley's bill was $2245.46, for oak, pine, &c., furnished between January 15th and May 10th, 1867.

"An action was brought in the Supreme Court on the bond. The defendants demurred. The demurrer was overruled The defendants afterwards filed special pleas. A special verdict was rendered, and judgment thereon entered in the Supreme Court. A writ of error on said judgment was issued, and returned to this court.

"For plaintiffs in error, *D. McMahon*, of New York.

"For defendant in error, *A. Q. Keasbey.*

"The opinion of the court was delivered by

"SCUDDER, J. Upon the special verdict rendered in this cause, the Supreme Court has adjudged, as appears by the record returned, that the act entitled, 'An act for the collection of demands against ships, steamboats, and other vessels,' approved March 30th, 1857, is valid and constitutional, and that Nathaniel Ellis and Henry Jeroleman, the builders of said vessel, were the owners thereof, and competent to charge it with liens, and that the respective claims of the plaintiffs were subsisting liens under the laws of the State of New Jersey, on the said vessel at the time of exhibiting the same, and that the accounts claimed by the plaintiffs were due in this suit. Errors are assigned upon the several points of the judgment.

"I will consider first the construction of the statute in its application to the facts in this case as they appear on the record, assuming its validity; and next the validity or constitutionality of the act, so far as it affects this action.

"The suit is upon the bond given by the defendants to the plaintiffs below, to discharge the vessel from the seizure of the sheriff. This bond is compulsory, *in invitum*, put upon them by the statute before they can take their property from the custody of the law. They should not therefore be shut out from any defence which they have to the merits, and which they have pleaded and presented to the court with proper diligence, and without waiver.

"The condition of the bond is, that the obligors shall pay the amount of all such claims and demands as shall have been exhibited to said commissioner, which shall be established to be subsisting liens upon said vessel, pursuant to the provisions of said act, at the time of exhibiting the same respectively. There can be no subsisting lien, if the provisions of the act have not been met, or if the act itself is a nullity. These particulars must be established by the plaintiffs, when challenged and denied in proper legal form by the defendants, and this defence is open to them by the very terms of the condition of the bond.

1. Are these claims subsisting liens under the statute, assuming its validity?

"It is insisted in opposition, that the two several debts in the declaration mentioned were not contracted by any master, owner, agent, or consignee of said schooner. The timber was bought for the vessel by Jeroleman, who was the contractor and builder. It is said he was only the builder, not the master, owner, agent or consignee.

"The vessel, when seized by the sheriff, was on the stocks, in the possession of Jeroleman, to be built and finished under his contract with Edwards and others, above stated. The work was all done, and the materials furnished by him. It was not completed, not delivered, and the title remained in the builder, unless there is some special condition in the contract which alters the general principle of law. See the cases cited in the opinion delivered in the Supreme Court, especially *West Jersey R. R. Co.* v. *Trenton Car Works*, 3 *Vroom*, 517, decided in this court June Term, 1866, holding, that in the case of an executory contract for the sale of an article not in existence, but to be manufactured, even when the contract price is paid in advance, no title passes until the thing is completely finished, and is either delivered to the orderer or is appropriated to his benefit, or set apart for him, or is accepted by him.

" It is claimed that there has been a delivery, appropriation and acceptance under the terms of the contract. The only part of the contract that can have this effect is the express provision, that from time to time, as the several instalments were paid by the parties for whom the vessel was built, and upon the payment of each instalment, the said schooner, so far as then constructed, and the materials therein inserted, shall be and become the property of the said parties of the second part.

" This is an agreement, that on payment of the first instalment, and of each succeeding instalment, the general property, in so much of the vessel as is then constructed, shall vest in the purchasers. It is not necessary, therefore, to do more than again refer to the authorities cited in the opinion of the Supreme Court, upon the effect of a stipulation in an executory contract to pay certain instalments as the work progresses. A summary and review of all the important cases upon this point will be found in the brief of counsel, and in the opinion of Justice Denio, in *Andrews* v. *Durant*, 1 *Kern.* 35. This last case denies the authority of *Woods* v. *Russell*, 5 *Barn. & Ald.* 942, and *Clarke* v. *Spence*, 4 *Ad. & El.* 448, which have often been doubted, explained and modified, and returns to the principles held in the earlier English cases, and in *Laidler* v. *Burlinson*, 2 *Mees. & Wel.* 602, that the general rule is, that under the contract for the building of a vessel or other thing, no property vests in the person for whom it is agreed to be built, until it is so finished and delivered. This case also holds that the rule is the same where certain portions of the contract price are agreed to be paid, and are paid by the builder at specified stages of the work; and when an agent of the person for whom the article is to be constructed is appointed, and actually does superintend and approve the materials and work. Thus covering the points wherein Woods *v.* Russell and Clark *v.* Spence are distinguished from the general rule.

" In the present case, our Supreme Court has decided that an executory contract to build a vessel, to be paid for in instalments as the work progresses, the title remains in the builder until the work is completed and delivered. The rule is accurately expressed, and is supported by the weight of authority.

" But in this contract we have something different; the express stipulation that the property shall pass as the several instalments are paid, and it is contended that upon the payment of an instalment, the builder ceased to be the owner, and the person who furnished materials to the builder could have no lien.

"The true construction of such contract, and its effect in depriving a party of a lien, can be determined when the question arises. Here, there is no proof that any instalment was paid before all the materials were furnished and the vessel seized by the sheriff.

"The only finding of the jury in their special verdict upon this point is, 'that the original contract price for constructing said vessel would have been about $21,000, but said Jeroleman was paid in excess of said price about $1500. There is no time given and no fact stated upon which an appropriation of payment could be founded. The builder was therefore, in law, still the owner of the vessel, and the debts contracted by him became liens on the vessel, under the statute.

"The burden of proof was on the defendants to show their payments and the change of title, if there were any.

"The next point of exception is, that this act was not intended to apply to vessels on stocks, newly and primarily built. The different particulars in the statute under sections 1st, 3d, and 8th; are cited to show that an existing vessel having a name, a commander, tackle, &c., is contemplated, but the first section which gives the remedy, is more general, and by separating its terms, we have a lien given for a debt contracted by the owner for work done, or materials or articles furnished in this state for or towards the building a ship or vessel. The suggestion of counsel that this means rebuilding, is a substitution of one thing for another without authority, a shaping of the statute to fit the argument There is no sufficient reason to suppose that the act excludes a lien for building a new vessel. It includes this, and also, the repairing, fitting, furnishing or equipping an existing vessel. The words and terms may be used disjunctively.

"These are the points of objection to the statute, assuming it to be valid, but denying its application to this case. But it is further insisted—

"1. That this lien act contravenes the constitution and laws of the United States, conferring admiralty jurisdiction in the federal courts. *Art. 3d, Sec. 2d, Judiciary Acts,* 1789, 1854.

"2. That it violates the right of trial by jury given by the constitution of New Jersey.

The first of these constitutional objections was disposed of on the demurrer to the declaration. The court overruled the demurrer and held that the contract for building a ship within the state is not a maritime contract, but a contract for building entirely under state control, which may be enforced by a common law remedy, or by any new remedy which the legislature may provide.

"To avoid any misapprehensions, it is however stated that so far as the law is designed to aid in the enforcement of a maritime contract for which admiralty may proceed *in rem*, it is clearly in conflict with the constitution and laws of the United States.

"Whether this last ruling conflicts with *Randall* v. *Roche*, 1 *Vroom*, 210, it is not necessary now to consider; but it is sustained by the cases in the United States Supreme Court, cited in the opinion delivered in the court below, and in the recent cases. *In re Josephine*, 39 *N. Y.* (12 *Tiff.*) 19; *Jackson* v. *Steam Propellor Kinne, United States District Court of New Jersey, Am. Law Reg., Vol.* 8, 470; *Vose* v. *Cockcroft*, 44 *N. Y.* 415; *Sheppard* v. *Steele*, 43 *N. Y.* 52.

"The judgment upon the demurrer is not before us on this writ of error, which brings up only the judgment of the Supreme Court upon the special verdict. But as this later judgment also determines, in general terms, that this act is valid and constitutional, it may be proper to repeat the qualification made in the Supreme Court, in deciding the demurrer, that it is constitutional in its application to this particular case of building within the state.

"The next point urged, that this lien act prescribes a remedy which makes no provision for a trial by jury, was pressed with much earnestness by counsel, mainly on the authority of *Parsons* v. *Russell*, 11 *Mich.* 113; *Greene* v. *Briggs*, 1 *Curtis C. C. R.* 311, and *Wynehamer* v. *People*, 3 *Kern*, 378. The last two cases arose under acts for the prevention of intemperance, which were summary in their proceedings, confiscating liquors, fining and imprisoning by *quasi* criminal processes, and were new and anomalous in many of their features. It is sufficient to say, that they are not applicable to the present case, for reasons that will hereafter appear in considering our law with reference to other existing statutes. The case of Parsons *v.* Russell, is under a statute similar to ours, and appears to be directly in point, but it was decided by a divided court, with little notice of other statutes, *in pari materia,* if any there be in that state, and it is without conclusive authority or precedent.

"The counsel have not found another case of like purport.

"On the other hand, *Sheppard* v. *Steele,* 43 *N. Y.* 52, decides that their lien law of 1862, entitled 'An act to provide for the collection of demands against ships and vessels,' which is similar to ours, is not unconstitutional as infringing the right of trial by jury. The reason assigned is that liens were given in such cases before the constitution of 1846, which were enforceable in equity, without a jury; and that they were not, therefore, cases where, within their constitution, (*Art.* 1, § 2,) a trial by jury had theretofore been used. But this is not all. A fuller consideration of the opinion of the court is instructive in determining the present case. Its statements condensed and generalized, that the legislature could give a lien of this kind, and in the absence of any statutory remedy provided, equity would enforce it without a jury, by process older than our constitution, distinguishes this remedy from the ordinary issues in civil causes before a jury. It gives to us intimations of remedies in particular cases, which have come to us from the civil law, and which have been used for centuries without a complaint that they infringe on the common law right of trial by jury. Such are all the proceedings in courts of equity and other courts adopting its forms So in admirally courts, in the enforcement of maritime liens. So in special cases by statutes in analogy with these extraordinary remedies, we have a new and peculiar jurisdiction conferred. 1 *Pars. Mar Law,* 489; *Story's Eq. Jur.* 506, 1216.

"Our colonial constitution of July 2d, 1776, § 22, ordained that 'the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, forever.'

"Yet, in 1798, an attachment law against absconding and absent debtors was passed, which has the very features which are most obnoxious to the charges made against this law, and it still stands upon our statute book, enforced daily in our courts without a question as to its constitutionality.

"The goods of a defendant, upon affidavit of indebtedness, &c., are seized, notice is advertised; if he fail to appear, his property is sold by auditors and distributed among the applying creditors. The defendant may thus be deprived of his property without a trial by jury. Who doubts the legality of this proceeding? If the defendant appear, the statute regulates the method and the manner of discharging his personal property from the lien of the attachment. He was required by the older statute to enter into special bail; by later statute to give bond with one or more sufficient sureties, approved by the court, in double the amount of the personal property attached, conditioned for the return of the goods, if judgment be entered for the plaintiff By this his goods are relieved, and he may plead and have his trial by jury. This is substantially the form of remedy given to enforce the lien against vessels under the statute in controversy.

"Our present constitution of 1844 agrees substantially with the old constitution in securing the right of trial by jury. Article I, § 7. ordains that the right of trial by jury shall remain inviolate. It is now said that the recent law of 1857 violates this right, because it requires a person to give a bond, which, from poverty and being unknown, he may be unable to do, before he can have a trial by jury.

"The requirement to give a bond is for the discharge of his property from the lien and custody of the law, and then he has his trial by jury upon the issue, whether he is a debtor or not. He must exercise his right under such reasonable regulations as the legislature may establish for the security of creditors, and there is no violation of the right.

"When goods were taken in distress for arrears of rent, although they were formerly only detained as pledges for enforcing the payment of such rent, a more effective remedy was provided by an act of 1795. After holding the goods for ten days, with notice of the taking, if they were not replevied they were sold and the proceeds applied to the payment of the rent. A bond must be given in replevin before the goods are discharged, and before the right to sell them can be tried by a jury, under this statute.

"In 1855, a supplement to our practice act was passed, requiring the defendant in every action at law to file with his plea an affidavit that the same is not intended for the purpose of delay, and that he verily believes he has a just and legal defence to said action on the merits of the case. No. such requirement existed before the constitution of 1844.

"If this affidavit is not filed the defendant's plea is a nullity, judgment by default is entered, an assessment of damages is made by the court, or by a judge or clerk of the court in vacation, and his property is sold under execution. These bonds and affidavits are regulations of the practice of the courts, which preceded the trial, and are in no legal sense a violation of the right. This right of trial by jury in civil causes, as commonly understood and as construed in our courts, is the right to have all such causes heard before a jury of twelve men, according to the usual process and practice of the courts of common law. It is intended to prevent the arbitrary seizure and disposition of person or property, and the determination of rights affecting them, without the regular and orderly proceedings of courts of law. If a person is arrested, he gives bond and the right of action is tried. If his property is seized, he regains it by giving security for its return if the right is determined against him. In each case, his right to a jury trial remains.

"This act of 1857, giving a lien on vessels, introduces no new or arbitrary remedy, but uses such as is well known and used in our law in similar cases, and the right of trial by jury under its proceedings remains inviolate. This conclusion appears to be clearly within the construction which has been given to the sections of the constitution of the United States, and the constitutions of other states, and many statutes of like import. See *Sedg. Stat. and Const. Law*, 548; 1 *Bish. Cr. Proc.* 893, *and notes*; 2 *Story Const.* 1768; 1 *Kent Com.* (*9th Ed*) 618; *Bonaparte* v. *C. and A. R. R. Co., Bald. R.*, 205; *McGear* v. *Woodruff*, 4 *Vroom*, 213.

"The judgment of the Supreme Court is affirmed."

Upon the delivery of this opinion a rule was entered by the Attorney of the plaintiffs in error; *against* whom the judgment was rendered which is found in the printed case, page 16, asserting that the Court was of opinion that the said Act was not in any respect repugnant to the constitution or laws of the United States as contended for by the plaintiffs in error, but is in every respect valid and constitutional, and that it was thereupon adjudged that the Act was not in any respect repugnant to the constitution or laws of the United States, and that the judgment of the Supreme Court be in all things affirmed.

In this state of the record the judgment of the Court of Errors was removed to this Court.

After such removal, on the first day of April, 1874, the Court of Errors, upon the suggestion of the defendants in error that the rule of June, 1872, was erroneously entered by the Attorney of the plaintiffs in Error and did not correctly express the judgment of the Court, made an order that such rule be wholly annulled and stricken from the minutes, and that a rule to affirm be entered by the Attorney of the defendants in error, in conformity with the decision of the Court on the question before it.

And such rule was accordingly entered April 1st, 1874, *nunc pro tunc*, as follows: stating the case. "This cause coming on to be heard in the presence of the counsel for both parties, and the Court having read and inspected the record, and the Errors assigned for the reversal of the judgment of the Supreme Court, and having heard the arguments of counsel and duly considered the same, and the Court being of opinion that Nathaniel Ellis and Henry C. Jeroleman, the builders of the vessel in the declaration of the plaintiffs below mentioned, were the owners of the said vessel at the time when the materials were furnished by the said plaintiffs, within the meaning of the Act of the Legislature of New Jersey, entitled 'An act for the collection of demands against ships, steamboats and other vessels,' and as such owners were competent to charge it with liens for such materials, and that the respective claims of the defendants in error were subsisting liens upon said vessel under said Act; and that the said Act does not conflict with the constitution of the State of New Jersey by violating the right of trial by jury; it is therefore on this twentieth day of August, 1872, ordered, adjudged and determined by the Court here, that the judgment of the Supreme Court be affirmed, and that the defendants in error do recover their costs in this Court to be taxed."

After the obvious error in such rule had been thus corrected, and the true questions decided by the highest court thus shown upon its records, the defendants in error applied to this Court for a writ of certiorari to the Court of Errors, to bring up these subsequent rules.

Such a writ was issued and has been returned, and the whole action of the Court of Errors is now before this Court.

POINTS.

I.

This Court will look into the record as amended in order to ascertain whether it has jurisdiction. The Court below was bound to amend its record if it was found to be erroneous, and having done so, the amended record now before the Court must be treated as true.

II.

Upon the state of facts shown by the record as amended, the case ought to be dismissed for want of jurisdiction;

Because,

The record does not disclose "a final judgment of the highest court of the state, where is drawn in question the validity of a statute of the state on the ground of its being repugnant to the constitution or laws of the United States, and the decision is in favor of such its validity," and therefore this Court has no jurisdiction under the twenty fifth section of the judiciary Act.

III.

Even upon the original record it is clear that no constitutional question concerning the statute was decided by the Court of Errors in favor of its validity, and this Court has therefore no jurisdiction.

IV.

Assuming that this Court has jurisdiction, the judgment should be affirmed, because the Act of the Legislature of New Jersey, so far as it provided a remedy to enforce a lien for building a vessel on land in New Jersey, was not repugnant to the constitution or laws of the United States, such a contract not being a maritime contract and therefore not within the exclusive jurisdiction of the Federal Courts.

BRIEF.

1. The Court, having by certiorari brought the amended record here, will treat it as if it had been correct in the first instance and will examine it to ascertain its own jurisdiction.

The Court of Errors was bound to make this amendment. It is their duty to see that their records are faithfully kept and speak the truth in all matters to which they relate and on which the Court acted. For the records import absolute verity and cannot be controverted elsewhere. Where any accident or negligence of clerk or attorney has caused an error, it is the prerogative and duty of the Court to amend it and make it speak the truth.

And such amendments may be made after the case has been taken to the Appellate Court. And that court will, when justice requires it, delay their judgment in order to enable the party to apply for such amendment in the court below and bring up the amended record by certiorari, at any time.

Powell on Appellate Proceedings, 173 and 174
and cases there cited.

2. Upon the amended record, this Court has no jurisdiction.

The question of the constitutionality of the act was not before the Court and was not decided.

It is settled that before the Court can entertain jurisdiction to revise the judgment of a state court, the point it is called upon to review must have been raised and must have been decided adversely to the plaintiff in error. And though it need not appear by express averment, if the record shows it by necessary intendment, yet it must appear that the point was actually decided, after receiving the consideration of the Court. It is not sufficient that it might have arisen or been applicable to the case, unless it is further shown by the record that it did arise and was applied by the Court to the case.

The Victory, 6 Wall, 382.
Hamilton Co. v. Mass., 6 Wall, 632.
Steines v. Franklin Co., 14 Wall, 15.

No such state of things is shown by this record, nor can it be inferred by any reasonable intendment.

On the contrary the record shows that it did not arise and was not decided.

The point was expressly raised and disposed of, by the Supreme Court on the demurrer.

This was in 1869. The constitutionality of the act was the sole subject of the judgment then rendered.

That judgment was not removed to the highest court. It was acquiesced in. The defendants asked leave to withdraw their demurrer and plead on the merits.

If they had desired to review this decision, they could have done so; and if they had, and the judgment of the Court of Errors had been adverse to them, they could have brought the question here.

In that case it would have been disposed of long ago.

They chose to go to trial on the merits They filed their pleas and put their case on other grounds. They chose to waive this question and not seek to carry it to the Appellate Court.

In the case of Caperton v. Bowyer, 14 Wall, 216, such waiver of a question raised on demurrer in the subordinate court took place, and the point not appearing in the record of the court of last resort the writ was dismissed.

The record of the judgment of the Supreme Court contains no reference to the constitutional question. It states clearly the grounds of the decision—that the claims were subsisting liens under the laws of New Jersey.

And the opinion of the Court states that "*the question in the cause* is, whether the claims of the plaintiffs were subsisting liens on the vessel at the time they were exhibited." And it alludes to the fact that the validity of the law had been decided on the demurrer.

And the record of the Court of Errors as amended shows that the question whether the builders were owners at the time the materials were furnished and whether the claims were liens, was the sole question before the Court.

It is true that a rule erroneously entered by the attorney of the plaintiffs in error stated that the Court in fact decided what was not before them for decision, but that this was an error is plain from the record itself, and the amendment made by the Court is an express assertion that the constitutional point was not considered or decided.

And the opinion of the Court of Errors expressly states that this point was disposed of on the demurrer, which was not before the court on the writ of error, which brought up only the judgment of the Supreme Court on the special verdict.

It is true that the opinion states that the Supreme Court also determined in general terms in the latter judgment that the act was valid and constitutional, and proceeds to make some qualification of it,—but it is plain that such comment on the judgment of the Supreme Court was an inadvertence, or the Court of Errors was misled by some similar erroneous entry in the minutes of the Supreme Court, which does not appear in this record.

At all events it is plain that the judgment of the Supreme Court, which was the subject of review, contained no such point, and the Appellate Court did not assume to decide it.

Nor is it sufficient to say that the Court must have held the act valid in order to affirm a judgment on a bond given under that act, and that it was therefore a necessary point in its judgment.

It cannot be assumed that every time a court acts under a statute, the validity of it receives consideration.

In the case of the Victory the action was founded upon a State lien law for supplies to vessels, and the ground on which the judgment was sought to be reviewed, was the constitutional point raised here. But the writ was dismissed because this Court could not find that the point was actually raised and considered below.

It denied the inference that the validity of the act must have been considered and determined.

It is true that the plaintiffs in error made this point in their assignment of errors, and counsel may have had it in his brief.

But it is not enough for counsel to assign an error that manifestly was not made, or to argue a point clearly not in issue. It must appear affirmatively by the record that the point was properly before the Court and was decided.

Cockroft *v.* Vose, 14 Wall, 5.

In this case which was on a bond under a similar statute, the point was not raised until the case reached the Court of Appeals, and there it was raised and discussed, but because it did not appear that the Court decided in favor of its validity the writ was dismissed.

In Railroad Co. vs. Rock, 4 Wall, 177, the Court says "it is probable that counsel in the argument of the case in the Supreme Court of Iowa insisted that these matters were involved, and that the Chief Justice felt bound to certify when requested, that they were drawn in question. But if the record does not show that they were necessarily drawn in question this Court cannot take jurisdiction. It must appear in the pleadings of the suit and from the evidence in the course of the trial and the exceptions taken. It must be that such a question was necessarily involved and that the Court would not have given judgment without deciding it."

See also Parmelee v. Lawrence, 11 Wall, 36.

But it is unnecessary to cite the numerous cases establishing this familiar position.

The pleas filed by the plaintiffs in error upon which the only issues determined could arise, after withdrawing the demurrer which did raise this question, impliedly admit the jurisdiction of the Court below, and the validity of the statute; and place the defence on the fact of ownership of the vessel, and the existence of the liens under the act.

It is too late now to come here for a review of a question which they did not think it necessary to take to the highest court of the State.

The Victory, 6 Wall, 385.

3. Even upon the original record—putting aside the amendment—it is plain that no such question was raised in the Supreme Court, or carried to the Court of Errors; and that the latter Court did not consider it a question before them.

The comments already made upon the record, make further discussion on this point unnecessary.

A reference to the three opinions—now properly examinable by the Court in considering this question of jurisdiction—will put the matter beyond controversy.

The Supreme Court decided no such question, and the Court of Errors, therefore, could not and did not review it.

The writ of error should, therefore, be dismissed.

4. If the Court had decided the act valid on the ground that a contract for *building* a vessel is not a maritime contract, such decision would have been in conformity with the uniform decisions of this Court, and would have been correct.

And this Court will not be swift to assume a doubtful jurisdiction, in order to reverse a decision of a State court founded upon four of its own decisions.

It is settled in this Court that a contract for building a vessel on land, is not a maritime contract.

People's Ferry Co. v. Beers, 20 How., 393.
Roach v. Chapman, 22 How., 129.
Morewood v. Enequist, 23 How., 494.
The Belfast, 7 Wall., 624.

This has also been held in late cases at the Circuits.

Cunningham v. Hall, 1 Clif., 43.
Young v. The Orpheus, 2 Clif., 29.
The Norway, 3 Ben, 163.
The Revenue Cutter, 21 Law Reporter, 284.

This point was distinctly determined in the case of The People's Ferry Co. v. Beers, in 1857, and has been stated with approval in the subsequent cases, and adhered to through all the changes that have marked the views of the Court on the subject of the extent of the admiralty jurisdiction of the courts of the United States.

And such was the doctrine of this Court when the point was presented to the Court of New Jersey for decision.

That the Courts of New Jersey followed this Court in its repeated adjudication of this point, is the ground upon which a renewal of their judgment is now sought.

It is contended that the decisions of this Court since 1857, and especially the case of Insurance Co. vs. Dunham, 11 Wallace, 1, have manifested so wide a departure from the old restrictions upon admiralty jurisdiction, that the logical result must be, the abandonment of the position that a contract for building a vessel is not a maritime contract.

It is true that there has been a constant tendency to throw off the fetters imposed upon the admiralty courts by English traditions, and to place the extent of their jurisdiction upon grounds widely differing from the long established rules of the English courts, and more in accordance with views derived from its essential nature and objects, and with the laws of the most enlightened and oldest commercial nations of the world.

It is true that one by one the old restrictions have been shaken off; that the limitation of public rivers to the ebb and flow of the tide, the limitation of maritime contracts to those not made on land, the distinction between contracts made in home and foreign ports, have gradually been abandoned or modified; and that by a series of decisions, culminating in the case of The Insurance Company v. Dunham, and Wilson v. Bell, October Term, 1873, it is now settled that as to *locality* the admiralty jurisdiction extends not only to the main sea, but to all the navigable waters of the United States, whether land-locked or open, salt or fresh, tide or no tide.

And that as to *contracts*, the fundamental inquiry is whether it is or is not a *maritime* contract, and that that question depends not upon where the contract was made, but upon its *subject matter*.

Accepting these principles as settled, can it be maintained that the question whether a contract for building a vessel, made and fulfilled before the ship has taken its maritime shape or touched its proper element, is a maritime contract, is still to be regarded as an open question in this Court?

It is useless to speculate whether if the wider views now held, had been entertained by the judges who decided this point in 1857, the result would have been different.

It is enough to say that during all the changes of opinion manifested by the Court, the positions then taken upon this particular point, have never been impugned or modified.

On the contrary they were expressly approved and reiterated in Roach v. Chapman. They were mentioned with approbation in Morewood v. Enequist, and in The Belfast as late as 1868, and in the case of The Insurance Co. v. Dunham, Mr. Justice Bradley, alluding to the fact that in other cases it had been sought to press the decision in People's Ferry Co. v. Beers to its logical result in restricting admiralty jurisdiction, does not deny its soundness or authority, but quotes the answer of Judge Grier to the argument, viz., that the decision of the Court that a contract to build a ship was not a maritime contract, must be confined in its effect to that precise question, and not extended by implication to other cases

And here, I submit, is the true position now occupied by the Court—that all "contracts, claims, or services, purely maritime, and touching rights and duties appertaining to commerce and navigation are cognizable in the admiralty courts." (The Belfast, 7 Wall., 637.)

That such contracts, claims or services must appertain to *commerce and navigation*, and to ships as their instruments, *after they have become ships*, and have reached the only element upon which navigation can exist; to vessels, as such, floating structures ready for navigation, not to incomplete masses of material in the hands of a manufacturer in a carpenter shop, which may at some future time become a ship and float upon the seas; not to the embryo, motionless, inert, and perhaps to be an abortion, but to the ship, not necessarily full grown and complete, but at least born into its proper world, and ready "to walk the waters like a thing of life."

That a contract is only maritime in a jurisdictional sense, when it relates to a ship afloat, equipped with its motive power, ready at least for its crew, and prepared to be the subject or occasion for contracts of bottomry, affreightment, wages, insurance, demurrage, salvage, towage, &c., or the instrument of collision, or other marine torts and injuries.

If this is the true position of the Court, it is of no avail to argue that the jurists and lawgivers of other maritime countries have held that a contract to build a ship is a maritime contract. This may be admitted, and the reasons for such a doctrine may be very sound as applied to the circumstances of those countries.

It is very natural that Mr. Benedict, whose views were not sustained in the case of The People's Ferry Co v. Beers, should re-argue his case in his new edition, and set forth more fully the Continental authorities in favor of his position.

But this Court may adopt those views so far as the circumstances of this country seem to require. It *has* adopted them from time to time, in modification of former views, as the exigencies of the case have demanded.

It can stop where it pleases.

It has deliberately chosen to stop at the point where the ship reaches its native element, and not to trace it back to its first germ on the land. If it did it would lead to declaring that a contract to fell a tree in the forest intended for the keel of a ship, is a maritime contract.

After the wide departure from old views indicated by the decision of the case of The Genesee Chief and other cases, this Court distinctly held such a contract not to be maritime.

And as that departure grew still wider, the Court adhered to that view, manifesting no disposition to modify, but only to let it stand as a starting point.

And in the late cases in the first circuit above cited, Mr. Justice Clifford, whose views have always tended to the just enlargement of admiralty jurisdiction, maintains the position taken by this Court with full approval, and elaborately explains the grounds upon which it is properly held in this country, that a contract to furnish materials to be used in building a structure on land intended to be a ship, is not a maritime contract.

Under these circumstances the question cannot be regarded as an open one.

In every case in which the wider views of admiralty jurisdiction have been announced, the subject matter has been distinctly maritime in its nature; it has touched rights and duties pertaining to navigation, to commerce conducted on the water, to the character of navigable waters, to contracts of affreightment and marine insurance, and to torts committed upon public waters.

The intention has been plain to hold as to the courts of admiralty that their "control stops with the shore."

And even if this Court would not be restrained from overthrowing its repeated decisions merely for the sake of being logically consistent, it would find reason enough to stand by them, in the nature of the question, and in the consequences to which a different view would lead.

If every contract relating to the building of a ship, steamboat, ferryboat, canal boat, or other structure intended to float upon the water, is a maritime contract, then the jurisdiction of the admiralty courts will indeed be widely extended. It will embrace the preparation of materials in the sawmill and the foundry intended for maritime uses. It will include the manufacture of marine engines and machinery, the making of cordage and sailcloth, the furniture for cabins and state-rooms, the manufacture of chronometers and nautical instruments, and all the various branches of business which are concerned with the production of materials which may, by simple adaptations, become suited to marine uses.

If a man sells to a carpenter three sticks of timber, one for a bridge, one for a house, and one for the keel of a ferry boat, the contract for the last would be a maritime contract, and the subject of admiralty jurisdiction.

If a man built two engines just alike, and sold one to turn the wheels of a boat, and the other to turn the wheels of a mill, one would be a maritime contract and the other not.

And the character of these contracts would be fixed, and their consequences would attach, as soon as the contracts were completed, whether the structure ever really assumed the form of a ship or not.

The builder might choose to change his mind and never launch his ship; or he might find it defective and useless as a ship, and break it up for other purposes; and so the contracts for materials would never in any sense pertain to commerce or navigation, but only to an abortive construction in a carpenter's yard.

All the contracts for the construction of the Stevens' Battery, made and fulfilled for so many years in a secret enclosure at Hoboken, must be deemed to have been maritime contracts, though the structure may never float, or be applied to marine uses.

In fact, it is not more logical to insist that a contract to furnish lumber to be used in constructing a vessel is necessarily a maritime contract, than it would be to say that to buy eggs is necessarily an ornithological transaction. The egg may become a bird and fly in the air, and the wood and iron may become a ship and float on the sea. But it is time enough when these results actually occur, to apply to either, the principles peculiar to the elements in which they move.

Endless confusion would arise from any attempt on the part of the Courts of Admiralty thus to follow up a ship to its remotest origin in the forest and the mine.

And for this reason it is, that this Court, in its widest extension of admiralty jurisdiction, has limited it to ships afloat, after they have in fact acquired the character and been prepared for the uses of marine structures.

And there is nothing inconsistent with this position, in holding that a contract to *repair* a ship is a maritime contract, for such contract can only arise after the ship has been engaged in navigation, and its sole purpose is to enable her to continue such maritime service, and it is a contract likely to be made in any port where the repairs are needed, and to be fulfilled while the ship is afloat or on the dry dock, as her needs require.

But it is useless to elaborate what has been so fully discussed and so distinctly settled, in the adjudications both here and in the Circuits.

It may be worth while to observe that the claims of these defendants in error do not arise out of any contract to build a ship, but are simple demands for the price of lumber sold out of lumber yards to ship builders who used them in a structure which probably did become a ship in the course of time, though it does not appear that she is launched yet.

The contract of the builders was made November 3, 1866, and when the vessel was seized she was still unfinished in the ship yard.

And the materials for which Elliott's claim was made, were simple chestnut timber furnished in the same month of November and before the vessel could have assumed any nautical shape, if even her keel was laid.

The State law gave a lien for materials so furnished, as it does for materials for a house or a dock. The vessel was seized under that law. The bond on which this action was brought was given by the plaintiffs in error under the provisions of that law.

The contract for furnishing materials to be used in building a ship, for which that law gave a lien, was not a maritime contract, and therefore the law giving the lien and prescribing the remedy, is not invalid, and the judgment of the Court of Errors ought to be affirmed.

It is unnecessary to allude to the point made by counsel for plaintiffs in error, that this State law is repugnant to the constitution of the United States because it abridges the right of trial by jury, and provides for taking the vessel without due process of law, and because it is contrary, in some way not clearly pointed out, to the 14th amendment.

It is enough to say that no such question was ever broached in any stage of this suit in the State Court.

No similar question was touched until the case reached the Court of Errors, and there the point was made that the act was in conflict with the constitution of *New Jersey* by abridging the right of trial by jury.

This point was fully considered by the Court and nothing need be added to the conclusive opinion of the Court holding the act not to be repugnant to the constitution of the State.

The notion that it violates the constitution of the United States and the 14th amendment, is an afterthought and needs no reply. If any were needed, it would be sufficient to say that the constisutional provisions referred to did not profess to control the power of the State governments over the rights of its own citizens, but only to declare that as the States grant them to their own citizens, or as they limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within their jurisdiction.

Any other construction would constitute this Court a perpetual censor upon all legislation of the States on the civil rights of their own citizens.

The Slaughter House Cases, 16 Wall., 77, &c.

Any such censorship upon the principles asserted by the Counsel in his Brief, would require the overthrow of a large amount of legislation and judicial decision in New Jersey so familiar from the earliest times, and so universally accepted by the Bar that no counsel in New Jersey would think of attempting to disturb them.

Nor can I believe that the learned Counsel would attempt a similar application of the limitations of the national constitution to the laws and proceedings of the State of New York.

A. Q. KEASBEY,
of Counsel for Defendants in Error.

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Supreme Court

OF THE UNITED STATES.

Nelson Edwards,
Charles A. Woolsey and
George Collins,
Plaintiffs in Error.
vs.
George W. Elliott,
David Ripley,
William A. Ripley,
Charles O. Ripley and
John W. Ripley,
Defts. in Error.

Points and Brief
of D. McMahon,
of Counsel
for Plaintiffs in error.

STATEMENT.

This cause comes up on a writ of error to the New Jersey Court of Errors and Appeals; which Court decided *(see Rule of Affirmance, p.* 16) that the Act of the Legislature of the State of New Jersey entitled "An "Act for the collection of demands against ships, steam-"boats and other vessels," approved March 20th, 1857, "is not in any sense repugnant to the Constitution or "laws of the United States, as contended for by the "plaintiffs in error, but is in every respect valid and "constitutional; and that Nathaniel Ellis and Henry "Jerolemon, the builders of the said vessel, were the "owners thereof and competent to charge it with liens; "and that the respective claims of the defendants in "error were subsisting liens under the laws of the State "of New Jersey on the said vessel; and that the contract for building set out in the special verdict herein, "is not a maritime contract, and the statutory remedy "thereon, to wit, the aforementioned act does not conflict with the Constitution or laws of the United States "and that the said act does not violate the right of trial "by jury, nor conflict with the Constitution of the State "of New Jersey in that behalf and that there is no error "in the proceedings of the Supreme Court herein and "their judgment is the same," and they further order, adjudge and decree that the said act of the legislature of the State of New Jersey is not in any respect repugnant to the Constitution of the United States. The writ of error was allowed by the Presiding Justice of the New Jersey Court of Errors, in accordance with the usual practice in such cases *(Phillip's Practice,* 101, *et seq.)*

The cause was brought before the New Jersey Court of Errors and Appeals by a writ of Error issued to the Supreme Court of New Jersey to review a judgment of the said Supreme Court rendered on a special verdict taken in the action at the Hudson Circuit in January, 1871.

The errors assigned in the New Jersey Court of Errors and Appeals on the return from the Supreme Court were (*see Assignment of Errors on p.* 15 *of the Transcript of the Record*):

1. That the Supreme Court of New Jersey erred in holding that the Act entitled "An Act for the collection of

"demands against ships, steamboats and other vessels," approved March 20, 1857, was valid and constitutional: whereas the same is not valid and constitutional.

2. That they erred in holding that Nathaniel Ellis and Henry Jerolemon, the builders of said vessel, were the owners thereof and competent to charge it with liens; whereas by law and in fact they were not owners of said vessel and not competent to charge it with liens.

3. That they erred in holding that the respective claims of the plaintiffs below were subsisting liens under the laws of the State of New Jersey on the said vessel at the time of exhibiting the same; whereas, by said laws, the said claims were not subsisting liens on the said vessel at the said time.

4. They also erred in rendering judgment for the plaintiffs below, whereas judgment should have been ordered for the defendants.

From the pleadings (*fols. 3 to* 23) and the special verdict (*see fols.* 24 *to* 39) the following history of the case is to be gathered:

On 3d of November, 1866, Nathaniel B. Ellis and Henry C. Jerolemon were co-partners and builders of the vessel in question, under a contract made in writing by Jerolemon with divers gentlemen to build for them, for the consideration of $54 per ton, a center-board schooner of certain dimensions, and to be constructed in a certain manner, with timber of various specified kinds and sizes, all of which are described at length in the contract in question which is set forth on pages 10 to 12 of the printed case. The vessel was to be delivered and launched safe in the water during May, 1867, and to be "light when delivered to owners" (*fol.* 31). The hull, deck and iron work of the vessel were to be finished "by the carpenter at his own expense, complete to a "cleat;" and there was to be no charge for extra work, in case anything was omitted (*fol.* 31). All the work and material used were to be of the best and most approved description to the satisfaction of Nelson Edwards (one of the plaintiffs in error), and in case of any disagreement a reference is made to another vessel (*fol,* 31) by way of pattern. As the vessel progressed she was to be insured at the builders' expense, and the policy assigned to Captain Edwards (*fol.* 31).

The contract then specified the mode of payment therefor, which was to be by installments, and are hereinafter stated.

The contract then contained (*fol.* 32) the following clause, viz.:

> "*It is further understood and agreed between the said* "*parties, that from time to time, as the several install-* "*ments herein provided to be paid, are paid by the said* "*parties of the second part* (*these are the parties for whom* "*the vessel is built*) *and upon the payment of each install-* "*ment the said schooner, so far as then constructed, and* "*the materials therein inserted, shall be and become the* "*property of the said parties of the second part.*"

By the terms of this contract, $2,500 were to be paid when the keel is laid; $3,000 when the frame was up; $3,500 when ceiled, deck beams in, and kneed off, and deck laid; $3,500 when outside plank is on and squared off; $3,500 when poop deck is on; $2,000 when ready for launching; and balance when delivered. These payments were to be made by each owner in proportion to the amount represented, and which were stated in the contract (*fol.* 32).

Under this contract the builder commenced and progressed with the work up to June 24, 1867, at which time Mr. Jerolemon executed and delivered to Nelson Edwards (one of the plaintiffs in error) an assignment of the contract (*see pp.* 12 *and* 13). Mr. Edwards thereafter completed the building of the vessel (*see Eighth Finding, fol.* 35). The original contract price was $21,000, and the builder Jerolemon was overpaid about $1,500 (*Ninth Finding, fol.* 35).

The builder Jerolemon, who was to have taken 1-16th of the vessel never paid any money on the construction account; the other parties, for whom the vessel was built, paid the same (10*th Finding, fol.* 36).

While Jerolemon and his partner, Ellis, were building the vessel, they contracted a debt with the defendant in error (Elliot) to the amount of $201.70 for timber used in the construction of the vessel in question (*see* 4*th Finding, fol.* 25). The particulars of these claims are set forth in the declaration of the plaintiffs below (*see pages* 6 *&* 7). Elliott says, the claim was created at request of Ellis & Jerolemon, agents of said vessel (*p.* 2, *line* 25).

On the 1st claim — viz., Elliott's of $201.70 — an attachment was sued out under the "Act of New Jersey "for the collection of demands against ships, steamboats "and other vessels," approved March 20th, 1857 (*Nixon's Dig.*, 4*th Ed. p.* 576; *see Recital in Bond, fol.* 12), and on the 19th June, 1867, the vessel in question, having no name (excepting that the name of John J. Ward had been proposed for it, 13*th Finding, fol.* 36), and not having been enrolled at the Custom House, nor licensed, nor measured (*see* 14*th Finding, fol.* 36), and being without any commander, and never having had one (*see* 15*th Finding, fol.* 37), was attached by the Sheriff of Hudson

County, while in a state of partial completion, and on the stocks (*fol.* 36, 12*th Finding*).

Subsequently the defendants in error, George David, Wm. Charles and John W. Ripley, delivered to the commissioners, issuing the warrant, an account in writing of their demand, claiming a lien on the property so seized for $2,245.46, and applied to be deemed attaching creditors of said vessel (*see Recital in Bond, also fol* 7).

The plaintiffs in error bonded under the statute (*fol.* 13). The defendants in error declared on the bond in the usual form for the two claims in question.

To this declaration issues of fact were joined (*see the Pleas and Replications, pp.* 7, 8, 9), and on the issues thus raised the cause was tried at the January Circuit, 1871, in and for the County of Hudson, before Justice BEDLE and a jury (*fol.* 24).

A special verdict was rendered, embodying most of the above facts (*see pp.* 9 *to* 14 *inclusive*), on which special verdict judgment was rendered, as before stated; on which judgment the said writ of error was taken. The assignment of error and joinder appear on pages 15 & 16.

From the judgment of affirmance by the said Court of Errors and Appeals of New Jersey the plaintiffs in error have sued out the present writ.

The following is the abstract of the pleadings.

ABSTRACT OF PLEADINGS.

DECLARATION on Bond, dated July 2, 1867, made in pursuance of 12th section of " Act for the collection of "demands against ships, steamboats, and other vessels," approved March 20, 1857.

Sets out Bond (copy attached to Narr.).

Also condition.

Elliot alleges that he furnished materials to Nathaniel B. Ellis & Henry C. Jerolemon, *agents*, in $201.70, for the building of schooner John J. Ward.

David Ripley and others allege that they furnished materials to said Ellis & Jerolemon, *builders* and *owners*, in $,243.46, for like building.

Elliot avers that his said claim is a lien upon said vessel.

Messrs. Ripley make like averment.

Breach.

Profert.

PLEAS.

1. *Non est factum.*
2. *Nil debit* generally.
3. " Elliott.
4. " Ripley *et al.*
5. Claims of Elliot not a subsisting lien at the time of the exhibition before Supreme Court Commissioner.
6. Claim of Ripley *et al.* not a subsisting lien, at same time.
7. Said Elliot & Jeroleman were not owners or agents of said vessel.
8. The two debts were not contracted by any master, owner, agent or consignee of said schooner.
9. That at the issuing and execution of said warrant there was no such vessel, called the John J. Ward, in being.

Page 9. Replication joins issue on all these pleas.

POINTS.

I.

This Court have the right to review the judgment of the New Jersey Court of Errors in this action below on the following grounds, viz.:

1. *That Court held that the act of the Legislature of New Jersey "for the collection of demands "against ships, steamboats, and other vessels," approved March 20th,* 1857, *is not in any sense or in any respect repugnant to the constitution or laws of the United States, as contended for by the plaintiffs in error, but it is in every respect valid and constitutional (see fols.* 47-48*).*

   The Act of Congress of 1867, Feb. 5, (*sec.* 2, 14 *Stat. at Large,* 386), holds that point, reviewable by the Supreme Court (*see Phillips' Pract., p.* 114 *et seq., quoting the decisions*).

2. *The New Jersey Court of Errors and Appeals also hold that the contract for building the vessel in question was not a maritime contract, and the Statutory Remedy therein to wit, the aforementioned act, does not conflict with the constitution and laws of the United States (fol.* 48*).*

   This question is also reviewable in the Supreme Court under the Act of 1867. Because if it is a maritime contract, then the said act is clearly under the case of the Josephine (39 *N. Y. Reports, p.* 19) unconstitutional.

3. *That the said act does not violate the right of trial of jury.*

This question is also reviewable in the Supreme Court under the Act of 1867. Because any State law, which in effect takes away or obstructs the right of trial of jury, abridges one of the privileges or immunities of citizens of the United States. It, in this case, also deprives him of his property without due process of law, and it denies to a person residing in New Jersey the equal protection of the laws of his State (14. *Amendment of the Constitution of the United States, Sec.* 1*; 5th & 7th Amendments*).

4. *That the act of New Jersey, in question, does not conflict with the constitution or laws of the United States.*

This question is also reviewable in the Supreme Court under the aforesaid act of 1867.

II.

The Statute of New Jersey entitled "an act for the collection of demands against ships, steamboats, and "other vessels," approved March 20, 1857 (*Nixon's Dig. p.* 576, *4th Ed.*), conflicts with the constitution and laws of the United States on the following particulars.

First. The said lien law prescribes a remedy which abridges the right of trial by jury. It also deprives a man of his property without *due process of law*.

Secondly. It creates a proceeding *in rem* to wit against a vessel by name (if she had a name). Such proceeding is unknown to the Common Law, seizing a man's property, and he cannot defend his right to his property *in specie*, unless he gives a bond—with security.

Thirdly. If he does not give such a bond, it authorizes by its peculiar course of proceedings a sale of a man's property without his consent, after complaint only and before trial, and it compels the owner to pay out of the proceeds of the vessel all the costs made by the plaintiff, even if, upon trial, it turns out that the latter had no ground whatever to cause the seizure.

Fourthly. It authorizes State officials or commissioners and judges to have jurisdiction over contracts and especially the one in question of a maritime nature.

Fifthly. It is confessedly unconstitutional so far as it authorizes a proceeding *in rem* against vessels on contracts clearly maritime. If invalid in that particular, it cannot be maintained for another purpose. It cannot be for one purpose invalid and yet for another valid. It must be wholly void, and if so, any proceeding under it must fall.

III.

The said lien law is unconstitutional, because it *makes no provision for a trial by jury, unless the owner of the vessel gives a bond with surety.*

Secs. 16 *and* 17, 24 *to* 34 *of the New Jersey Act, Nixon's Digest,* 4*th ed. pp.* 578–580.

What is the right of trial by Jury?

(*a.*) A common law jury of 12 men.

Wynehamer vs. *The People,* 3 *Kernan,* 378, 427, 458, 484.

(*b.*) In cases affecting personal liberty, such as a charge of misdemeanor, such right cannot be taken away by the legislature.

People vs. *Johnson,* 2 *Park Cr. Cases,* 322.
People vs. *Kennedy,* 2 *Park Cr. Cases,* 312.

(*c.*) In case of an offense indictable at the common law, it cannot be taken away.

Warren vs. *The People,* 3 *Park Cr. Cases,* 544.

(*d.*) All property is protected by the Constitution, of the U. S. without reference to whether its abuse engenders mischief.

Wynehamer vs. *People,* 13 *N. Y. Reports,* 378.
Constitution of U. S., 14*th Amendment, sec.* 1.

(*e.*) The Lien Act herein attacked allows a lien claimant on his *ex parte* affidavit, when fortified by the *ex parte* affidavits of one or more disinterested witnesses *(sec. 3 and 4 of the Lien Law of New Jersey, Nixon's Digest, pp.* 576 & 577, *4th ed.*) to sue out a process in the nature of an attachment *in rem* against a vessel. The sheriff, in that process, is directed to seize the vessel and to hold it and in due time, in default of the owner bonding it, is authorized to sell it *without any preliminary trial by jury on the merits of the claim.* The real defendant, the party contracting the debt, no where appears *by name* in the proceeding.

The owner cannot defend and have a jury trial, unless he gives a bond.

Secs. 11 *to* 18, *Nixon's Dig.*, 577–8.

This is against Common Right. Suppose him to be unable to give the bond, as many meritorious owners of small vessels would be unable to do, especially where they reside in a different State from the lien claimed. We find by sections 19 to 30 of the Act in question (*Nixon's Dig., 4th ed., pp.* 576–8) that in case a bond be not given, or the claims as presented satisfied, then the officer issuing the process is authorized to order the vessel so attached to be sold, and if after sale the owner desires to contest, he is allowed to do so if *he assents to a compulsory reference* (*secs.* 24 *to* 34, *same Act.*) In no other event does he appear to be allowed to contest the claim; so that the sale and the distribution may be against the will of the owner and without remedy unless he complies with the act aud gives the bond in the first instance, and in case of sale its proceeds may be distributed unless he consent to a reference.

The case of the *Flint River St. Bt. Co.* vs. *Roberts* (2 *Florida*, 102), which arose on a cognate statute in Florida, presents these views with startling force.

If after the sale the lien claimant is defeated on the reference as to the distribution of the proceeds, the owner of the *Rem* is without remedy to get his property back again *in specie*, —for that is sold—the proceeds are to be returned to him, *but not until the expenses of the proceedings and the commissions of the sheriff are in the first place deducted* (*secs.* 34 *and* 35),

This question arose under a similar statute enacted in Michigan, and the Supreme Court of that State (being its highest law court) in *Parsons* vs. *Russell* (reported in 11 *Michigan*, *p.* 113), held that the provisions of their State Constitution that no person "*shall be deprived* "*of Life, Liberty, or Property without due pro-* "*cess of law*," is intended to secure to the citizen the right to a trial according to the form of law, of the questions of his liability and responsibility, before his person or his property shall be condemned. The Boat and Vessel Law, conferring upon a claimant a right to condemn and sell a boat, &c., upon his bare assertion, without requiring substantiatory proof before a judicial tribunal, or any judgment or decree of such tribunal, is contrary to this constitutional provision and void.

P. S. This case in 11*th Michigan*, *arose on an action on the bond given under their act to relieve the vessel from arrest*—yet because of the clauses of the statute above adverted to, the whole statute was rendered invalid.

> *See the Michigan Statute in 2d vol. Compiled Laws of Michigan, chap.* 149, *p.* 1315, *&c. Hosmer & Kneeder Edn.*

The same question arose in the State of New York under their lien law of 1862 in the case of *Shephard* vs. *Steele* (43 *N. Y. Rep., p.* 52). It was claimed that the act was void, because it infringed upon the right of trial by jury, guaranteed by the N. Y. State Constitution, yet under the peculiar language of the constitution of the State of New York—viz., "*securing to every person a trial by jury in all cases in which it had been theretofore used*" (*Constitution of N. Y. of* 1846, *Art* 1, *sec.* 21), it being shown that the Legislatures of New York in 1798 (1 *Rev. Laws, p.* 130), amended in 1817 (*Laws of N. Y.*, 1817, *p.* 49), re-enacted in 1829, had passed similar laws, the constitutional provision in the N. Y. constitution of 1846 guaranteeing the right of trial by jury had not been violated.

The particular grounds upon which the case in 11*th Michigan* were decided, do not appear to have been urged in the case in the N. Y. Court of Appeals against its constitutionality.

In *Greene* vs. *Briggs* (1 *Curtis' Circuit Ct. Repts. p.* 311) which was an action of replevin, it was held that the legislature of Rhode Island cannot, *in face* of the provision in their constitution that the "right of trial by jury shall for ever remain inviolate," make such right dependent on giving a bond with security.

In the case at bar, the plaintiffs in error were compelled in order to relieve their property to give a bond, the one sued on. If they did not do so, they could not defend the lien nor the amount of it, except after a sale of their property and it had been converted into cash. Their defense then must be made before referees, thus taking away their right of trial by jury.

We complain, therefore, that the Act of New Jersey in question was a direct violation of that part of article 5, which provides that "no person shall be deprived of his property without "due process of law" (*see 7 Wallace, p.* 321). Also of article 7, which provides that "in suits "at common law, where the value in controversy shall exceed twenty dollars, the right "of tried by jury shall be preserved, and no "fact trial by a jury shall be otherwise re-examined in any court of the U. S. than accord- "to the rules of the common law" (*see the Justices on Murray*, 9 *Wall.*, 274; *Parsons* vs. *Bedford*, 3 *Peten.*, 433 *&* 444). Also of the 14th amendment, sec. 1, which provides that no state shall make *or enforce* any law which shall *abridge* the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or *property without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws. This amendment was passed by Congress on June 16th, 1866, (14 *Stat. at Large, p.* 358), but received the ratification of the requisite number of states prior to July, 1868, (*see Stat. at Large, App.* 4 *&* 12). The judgment of the Supreme Court of New Jersey was on November 9th, 1871. Also that part of the 10th section of article 1, which prohibits a state from passing a law impairing the obligation of contracts.

In 43 *N. Y. Reps.*, *opinion*, *p.* 564, the Court of Appeals of New York held that the constitutionality of the Lien Act might be raised at any stage of the case, even on appeal.

An amendment to the constitution annuls all jurisdiction which the constitution grants, whether past, present or future, which is contrary to the amendment, it arreste the action of even the Supreme Court in cases depending before it prior to the adoption of the amendment, and operates as an absolute prohibition to the exercise of any other jurisdiction than dismissing the suit.

Johnson vs. *Tompkins*, 1 *Baldwin*, 571 & 598.

3 *Dallas*, 382.

IV.

The said lien law of New Jersey is also unconstitutional, because it creates a proceeding *in rem* to wit against a vessel by name (if she had a name) such proceeding is unknown to the common law, and is not due process of law.

(*a.*) See the observations under subdivision *(e.)* of third point, which are appropos to this head.

(*b.*) Such a course of proceeding is foreign to the

common law and is not the "*due process of* "law," mentioned in the above named article 14, sec. 1, of the amendments to the constitution of United States.

(*c*.) Story defines "*due process*" &c., as being brought in "to answer" &c. This also means much the same "as agreeably to principles and "usages of law," found in many statutes, *e. g.* U. S. Judiciary Act (*see* 14 *Stat. at Large*, *p.* 82), and these principles and usages form the substration of all State and Federal laws.

Marshall Ch. J. Burr's trial,
Lorman vs. *Bensen*, 8 *Mich.*, 18,
Stout vs. *Keyes*, 2 *Doug. Mich.*, 184,
Chase vs. *Hathaway*, 14 *Mass.*, 224.
Hibbard vs. *People*, 4 *Mich.*, 125.
Brooks vs. *McEntyre*, 4 *Mich.*, 316.
Greene vs. *Briggs*, 1 *Curtis*, *C. C.*, 311.

and the language of CHRISTIANAY, *J.*, 5 *Mich.*, 261, is only an amplication and illustration of "against the law of the land."

The law of the land is not only a general law, but "a law which *hears* before it *con*-"*demns*, which proceeds upon inqnry and "renders judgment only *after trial*." Now, the lien law, herein impugned, hears the complaint only and then condemns property to be sold, before inquiry and before trial. To be sure, it stops short of handing over the proceeds to the plaintiff, but it deprives the owner of property of that property *in specie* and the guaranty in the constitution to a man of his property means beyond question "his property *in specie*" and not its money value. Property and money are not convertible terms. The law stops short of handing over the proceeds of the vessel to the plaintiff without any trial, but it does what is worse than even that would be. It compels the vessel owner to pay out of the proceeds of the vessel all the costs made by the plaintiff, even if upon trial it turns out that the latter had no ground whatever for causing the seizure.

This law indeed comes up to the extreme case supposed by CHRISTIANCY, J., (*in* 5 *Mich.*, 261.

(*d.*) In the *Moses Taylor* (4 *Wallace Reps.*, *p.* 42) *Opn.* FIELD, J., delivering the opinion of the Court, holds:

The action against the steamer by name, authorized by the Statute of California, is a proceeding in the nature of and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant and is judged and sentenced accordingly.

It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title, made under its decrees, validity against all the world.

By the common law process whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title.

In *Farrar* vs. *Hosford* (54 *Barb.*, *p.* 200) it is held that where a proceeding is against a vessel by name, whatever may be the nature of the claim, it is a proceeding in the nature and with all the incidents of a suit in admiralty.

All such proceedings are exclusively within the jurisdiction of the District Courts of the United States, hence a statute passed by a State Legislature, conferring the right to a lien on a vessel and to proceed against her by name, whatever may be the nature of the claim, is unconstitutional and void.

(*e.*) A proceeding *in rem* is one against a vessel by name (if she had a name).

Bened Pract., *sec.* 212, 264-5; *Chap.* 20, *sec.* 359 *&* 362; *Chap.* 23, *sec.* 436; *Form of Attachment*, *sec.* 438-9.

(*f.*) Such a proceeding *in rem* is held to be unconstitutional in cases of a maritime character.

The Josephine, 39 *N. Y. Reps.*, *p.* 19.
12 *Tiffany.*
Ferran vs. *Hosford*, 54 *Barb.*, 200.
Vose vs. *Cockroft*, 44 *N. Y. R.*, *p.* 415.
Brookman vs. *Hammell*, 43 *N. Y.*, 364.
The Moses Taylor, 4 *Wallace* 44.
The Belfast, 7 Wallace, 624.

Under the decisions of the Supreme Court of the U. S., in *Hine* vs. *Trevor* (4 *Wallace*, 555) the Statute of Indiana (2 *G. and H.* 301, *sec.* 655), providing for the enforcement of liens on boats and other water craft is void.

The original admiralty jurisdiction of the

United States Courts is now deemed to be ex-exclusive.

Ballard vs. *Wiltshire*, 28 *Ind.*,,341.
Vaughan vs. *McCullough*, *Ibid.*, *p.* 359.
Claycomb vs, *Cohn*, *Ibid.*, *p.* 483.

In *Ballard* vs. *Wiltshire*, (28 *Indiana*, *p.* 341), the ruling was made on a demurrer to the complaint on a bond given on discharge of the vessel from arrest under an attachment to enforce a lien against the vessel under the Indiana Statute. *Vaughan* vs. *McCullough*, (28 *Ind.*, 359), was a proceeding against the boat, but on appeal the appellants were substituted as defendants instead of the boat, and final judgment rendered against them. This judgment was reversed.

(*g.*) But independent of the fact, as to whether or not the contract, on which the proceeding in question was instituted, is a maratime character, we claim that the proceeding *in rem* is unconstitutional and void, because of the reasons aforesaid.

V.

The lien law of New Jersey is also unconstitutional, because by its peculiar course of proceedings it authorizes its officials *to sell a man's property without his consent*, on the *ex parte* oaths of a person and of witnesses (the former professing to have a claim against the property), but which is really against another. It gives a lien in this case contrary to the spirit of the contract under which the vessel was built, to such claimant. It compels a forcible sale of such owner's property against his will, *unless a bond be given*, so that in the case stated, the real owner in order to save his property from being sold, is compelled, however unwillingly and however unable he may be, to give a bond to relieve his property. This is not the equal protection of the laws mentioned in the 14th amendment, sec. 1.

(*a.*) In the case at bar the owners of the *rem* attached gave a bond, but take the case, which is the same in principle of citizens of New York getting their vessels built for sake of economy in New Jersey, as is often done. Their vessel builder fails to perform his contract, some local material man interposes his claim, exaggerated or otherwise founded on the *ex parte* oaths of himself and of one or more of his friends obtains an attachment *in rem.* The owner *must bond* his property *before he can defend* the claim. If he cannot furnish securities away from his home, his property *must be sold.* After it is sold, the owner has the privilege to contest the lien on the *distribution of the proceeds,* but such privilege is coupled with the provision, that he *must submit a reference.*

Such is the result of the various provisions of the New Jersey law in question.

(*b.*) The case at bar is one of hardship. The special verdict presents the contract under which the vessel in question was built (*see fols.* 26 *to* 34). By reference to it, the parties thereto by express stipulations therein intended that Jerolemon was to be considered to be the builder and not the owner, viz.:

1. The stipulation *(fol. 26)*, that Jerolemon agreed to build for the *parties of the second part the vessel* in question.

2. The stipulation under the head of launch *(fol. 31)*, wherein it is provided that the "*vessel was to be light when delivered to owners.*" The word owners in this connection means the parties for whom the vessel is built, and not the builder.

3. Then again the clause in the contract *(fol. 31)*, which provides that the hull, deck and iron work of this vessel is to be finished *by the carpenter* at his own expense, complete to a cleat.

4. The provision *(fol. 31)*, that the work and materials were to be satisfactory to Captain Nelson Edwards, a provision inconsistent with an ownership in the builder.

5. Also the provision as to insurance at the expense of the builder (*fol.* 32).

6. The provision as to payments (*contained in fol.* 32), viz.: "It is further understood "and agreed between the said parties, that "from time to time, as the several instal-"ments, herein provided to be paid, are "paid by the said parties of the second "part, and upon the payment of each in-"stalment the said schooner, so far as then "constructed and the materials therein in-

> "serted, shall be and become the property "of the said parties of the second part," are conclusive against ownership in the builder, so also the forfeiture clause in *fol.* 33.

The word "owner," as used in the lien law on ships and vessels, had a definite meaning. It, no doubt, means the "owner of the vessel," not of any individual part.

(*a.*) As soon as the keel was laid and the first payment of $2,500, which was payable thereon, was made by the parties for whom it was built and the latter became under and pursuant to the clause of the contract lastly quoted) the owners of such keel, and thereafter so often as they made payment they became owners of *so much* of the work as was done prior to such payment. If that be so, the builder never became "owner" of the "*vessel*" in question.

He might, in one point of view, be considered, until the first payment was made, the *owner* of the *keel*, but *that* is not a vessel He might, until the second payment is made, be owner of the frame, but the "*frame*" is not a vessel; and *toties quoties* through the whole series of payments Yet in face of the finding in the special verdict (*see 9th Finding, fol.* 35), that the builder was paid $1,500 over and above his contract price, the Court of Errors and Appeals of New Jersey affirmed in substance their Supreme Court, who decided "*that "until the payments called for in the contract "were made, the title was originally in the "builder and therefore that the burden was on* "*the defendants to show that such title was divested before the plaintiffs furnished the materials.*" Or, in other words, that long after the builder failed and surrendered the work up to the owners to finish, and after he had been paid the whole contract price and $1,500 in excess thereto, and after the contract itself provides that as the payments were made the title passed to the owners, then that a just construction of such lien law permitted the owners to have their property swept away by the dishonesty or neglect of their builder at the suit of a lien claimant and with whom they had no privity of contract, and *that the presumptions of ownership were reversed as to them.* Now we contend that a lien law which enables a builder to create a charge on the property of another in favor of a third party with whom the owner has no privity of contract and which coerces such *owner to give a bond* to pay the third party's claim before he can interpose a defence to the claim or have a trial by jury thereon, and which in case he is unable or unwilling to give a bond, order his property to *be sold* and the proceeds impounded, before he can defend the claim, and then orders that his only tribunal to try tha question after such sale, shall be a reference, and which orders in case he succeeds in defeating the claim, that the expeuse of the sale, including the commission of the Sheriff, shall be paid out of the property, is at variance with the spirit, aim and intent of the Common Law. Is unconstitutional and void, under the 10th Sec. of Art. 1, and 1st Sec., of the 14th Amendment.

(*c.*) It is claimed however, that if the lien law is held to be unconstitutional, then the attachment law passed by the State of New Jersey is also to be held to be unconstitutional.

To which we reply that, if the attachment laws of New Jersey present such objectionable features, they should be likewise held to be unconstitutional. But on examination of their attachment law (*Nixon's Digest* 38, *4th Ed.*, *et seq.*) it will appear that the rights of the owner of the property attached are invariably respected so far as not to authorize a sale, until some sort of a trial is had, viz.: a trial of a claim is had before a sheriff and jury (*pp.* 40 & 41); or so far also as to preserve the property attached *in specie* without sale, until judgment by default or otherwise is obtained, as a pledge or security for the appearance of the defendant. In the lien law on vessels, if the party cannot nor will not give a bond, his vessel is turned into cash against his will.

Attachments are not allowed to issue, except in certain specified cases principally of fraudulent debtors, or debtors claimed to be fraudulent.

Then again it is a feature in that attachment law, that the creditor is not allowed to receive any dividend, until he executes a bond to the debtor to repay to the latter any sum of money which he has received, to which he is not entitled (*sec* 47, *p.* 46, *Nix. Dig.*, *4th Ed.*), whereas in the lien law on vessels no provision for indemnity seems to be made for the case of an owner whose vessel is wrongfully attached and sold, other than to get the proceeds, out of which the expenses are to be deducted.

And from a careful inspection of that attachment law it will be found, that the theory of the same is that the property attached is held as security, and no sale of it allowed, except on proceedings in Court at which the debtor is allowed to be present or to have something to say.

The theory of most of our attachment laws seems to be, that the proceeding is ancillary to or to be supplemented by an action or proceeding *in personam*, in which the debtor has his day in Court before sale of his property.

VI.

The lien law of New Jersey gives a lien *in rem*, and makes provisions for a proceeding *in rem* against *all classes of vessels*, whether sea-going or not; on those in existence and used in navigation as well as on those in course of construction, for certain descriptions of work and for materials, whether the furnishing the supplies be of a *maritime character* or *not*, provided the same be done within the State.

(*a.*) We claim, if it is unconstitutional in its provisions so far as regards the lien of and the proceedings to enforce *in rem*, demands of a maritime nature, it cannot be upheld as valid to create a lien for and a proceeding *in rem*, for demands not of a maritime character.

The case of *Shepard* vs. *Steele* (43 *N. Y.*, *p.* 53) is against our point, but in that case the

Court cite no authority for their decision excepting

Golden vs. *Prince*, 3 *Wash.*, *C. Ct. p.* 318.
Commonwealth vs. *Hetchings*, 5 *Gray*, 482.

The first of these cases cited holds that a law may be unconstitutional and of course void in relation to particular cases; and yet valid to all intents and purposes in its application to other cases within the scope of its provisions, but varying from the former in particular circumstances.

(*b*.) Now it is true part of a law may be unconstitutional, and such part may for that reason be held to be invalid, while effect may be given to the constitutional portion.

Bank of Hamilton vs. *Dudley*, 2 *Peters*, 526.
Duer vs. *Sewall*, 17 *How*, *p*. 201.

But the question is, can a statute general in its language, applying to a class of cases the provisions of which are clearly unconstitutional be by construction under the same language held tó be constitutional for other purposes—we maintain not.

VII.

If the attachment was unlawfully issued, the bond on which the suit below was given *in invitum* and is void :—

Vose vs. *Cockroft*, 44 *N. Y. R.*, *p.* 415–19.

The Court in this case cited says ; "It is urged "also that although the attachment proceeding is "void, the bond is voluntary ; that if a man chooses "to give such a bond he shall be bound by it— "such is not the law. The bond is not voluntary it "is *invitem* compulsory given to obtain a release "of his property. If the attachment is void, the "bond falls with it."

S. P., *in Heman* vs. *Brinckerhoff*, 1 *Denio*, *p.* 184.
Caldwell vs. *Colgate*, 7 *Barbour*, 253, *see p.* 257–8.
Brockman **vs.** ***Hamill*****, 43** ***N. Y.*****, 554,** ***Opin.*****, 565.**
Parsons **vs** ***Russell*****, 11,** ***Mich.*****, 113.**

VIII.

A contract to build a vessel or to furnish materials to a new vessel in process of construction is of a maritime character.

(*a.*) This question arose in *Beers* vs. *The People's Ferry Co.*, 20 *Howard, U. S. Sup. Ct., Repts.*, *p.* 393, and in *Roach* vs. *Chapman*, 22 *Howard U. S. Sup. Ct. Repts.*, *p.* 159.

In the former case the syllabus of the case prepared by the reporter is as follows, viz: "The admiralty jurisdiction of the Courts of "the U. S. does not extent to cases where a "lien is claimed by the builders of a vessel for "work done and materials found in its con-"struction, *whether the District Courts can "enforce a lien in such cases where the law of "the State where the vessel was built, gave a "lien for its construction is a question which the "Court does not now decide.*

At the time the state of facts arose under which Beers' assignors claimed the lien on the Steamboat Jefferson, there was no lien law in existence in New Jersey (the act was passed in 1857), consequently, under the then existing decisions of this Court, in cases of alleged liens sought to be enforced on vessels, for work done in their home port, where no lien was given by the local law, it was clear that in the admiralty, conceding that the contract in question was of a maritime nature, no lien existed in *rem* (so the Court remarked, *p.* 400), and the case could have been decided on that point, but the Court went further, and decided that the contract was not of a maritime character (*p.* 402).

Justice CATRON, in his opinion, holds that the grant of admiralty jurisdiction in the constitution to the Courts of the United States, is measured by, and can only be ascertained by reference to what cases were cognizable in the Maritime Courts when the constitution was formed (*p.* 401). He further says: "For what was meant by it *then*, it must "mean *now;* what was reserved to the States "to be regulated by their own institutions, "cannot rightfully be infringed by the general "government, either through its legislative or "judiciary department. The contest here is "not so much between rival tribunals as between distinct sovereignties, claiming to "exercise power over contract property and "personal franchises."

The language of Justice CATRON, in measuring the sources of admiralty and maritime jurisdiction, has not been sustained by the subsequent decisions of this Court in the *St. Lawrence* (1 *Black.*, 522), and in the very late cases of the *Maggie Hammond* (*9th Wallace*), and of *Insurance Co.* vs. *Dunham* (11 *Wallace, p.* 1 *&* 22)*;* and the principle laid down by this Court in the last case, viz.:

1. That the admiralty and maritime jurisdiction of the United States is not limited by the statutes or judicial prohibitions of England.

First. * * * * *

Secondly. As to contracts, the true criterion, whether they are within the admiralty and maritime jurisdiction, is their *nature and subject matter,* as to whether they are maritime *contracts having reference to maritime service, maritime transactions,* or maritime casualties, without regard to the place where they were made (*p.* 26, 11 *Wallace*), appears now to be the settled law of this Court. The case in 11 *Wallace* also affirmed *De Lovio* vs. *Boit,* 2

Gallison R., p. 398. Justice **Bradley**, who delivered the opinion in 11*th Wallace, p.* 28, quotes some remarks concerning this case of *Peoples Ferry Co.* vs. *Beers*, to which we also refer this Court. In the case at bar, the special verdict shews that the vessel in question was a three masted schooner, to cost $54 a ton, and as the contract price amounted to about $21,000 (*fol.* 35), her tonnage must have been over 400 tons. She was to be launched and delivered safe in the water (*fol.* 31), and by reference to the contract set forth at length in the special verdict, she was to have all the parts and spars of a ship schooner of that tonnage (*fols.* 27 *to* 31). She was also built at East Newark, New Jersey (*fol.* 36). which this Court can judicially notice. is on the Newark Bay, an estuary or arm of the sea, in which she was to be launched, and to be called the schooner Jno. J. Ward.

Peyroux vs. *Howard*, 7 *Peters*. 343.
U. S. vs. *La Vengeance*, 3 *Dall.*, 297.

Examining this case by the test presented by *Insurance Co.* vs. *Dunham*. (11 *Wallace, p.* 1 *and* 22), the *contract for building this vessel had direct reference to maritime service, and maritime transactions* and materials furnished such a vessel towards its construction, was as much maritime as the furnishing materials to any vessel undergoing process of rebuilding or thorough repairing.

In *Roach* vs. *Chapman*, (22 *Howard, U. S. Ct. R., p.* 129), this Court decided that " where a " steamboat was built at Louisville in *Kentucky* "and the persons who furnished the boilers "and engines libelled the vessel in admiralty "in the U. S. District Court for Eastern District of *Louisiana*, that Court had no jurisdiction of the case—a contract for building "a ship or supplying engines, timber, &c. is "not a maritime contract. This Court so "decided in 20 *Howard*, 400, and now reaffirms that decision. The State law of Kentucky which creates a lien in such a case, "cannot confer jurisdiction on the Courts of "the U. S., and the preceding decisions of this "Court do not justify an inference to the contrary."

Upon examining the case in 22 *Howard* carefully, it will be found that it was argued only on the part of the appellants—*i. e.*, in favor of the jurisdiction, but the Court (GRIER, Justice), denied the jurisdiction, placing its decision upon the case of the *Ferry Co.* vs. *Beers*, 20 *How.*, *p.* 400. which in principle we claim to be departed from by this Court in 11*th Wallace Repts.*, *p.* 1 *and* 22 and we claim that the case in 22 *Howard* should fall with its sponsor in 20 *Howard*.

But if under the rule laid down in 11*th Wallace*, *p.* 1 *&* 22, the sources of admiralty jurisdiction are also to be found in the continental countries of Europe, in the decisions or practices of our Admiralty Courts under the Colonial rule and after the formation of our Government and not exclusively from England it will be found that contracts relating to the building of a new ship or furnishing materials for that purpose, were well recognized subjects of admiralty jurisdiction and our District Courts for many years entertained jurisdiction over such cases.

Davis vs. *A New Brig, Gil, p.* 473.
Harper vs. *A New Brig, Ibid, p.* 536.
The hull of a new ship, Davies R. 199.
The Richard Busteed, Sprague's R.

"The building of a vessel and the repairing "of a vessel are in principle the same thing. "Repairing is reconstruction *pro tanto*. They "are both of them, making fit for maritime "service as a vessel what was before unfit for "that service. Both furnish to the owner a "serviceable vessel for the purpose of com- "merce."

They are united and classed in the books of Maritime law, as like maritime causes of action or services of the same nature, and declared to be a lien upon the vessel by the maritime law from its earliest period. "Building, amending, saving, victualling."

Mr. Benedict, in his Admirality Practice, edition of 1870, has so forcibly expressed the following ideas, so *apropos* to this point, that we here quote them at full length, under the peril of being charged with trading on the ideas of another:

Sec. 213, page 116. "It is not always "easy to determine what is a maritime con- "tract. The dividing line between causes "maritime and not maritime, is not always "strongly marked. It is believed that a sure "guide in matters of contract is to be found in "the *relation* which a cause of action *has to a* "*ship*, the great agent of maritime enterprise, "and to the sea as a highway of commerce. "Where there is navigable water, and ships and "vessels, these are the subjects of the maritime "law. *If a case relate to a ship*, or to commerce on navigable waters, then it is subject "to the maritime law, and is a case of admiralty and maritime jurisdiction. The language of those nations in which the admiralty and maritime jurisdiction has been longest acknowledged, and where the system of "law which regulates maritime commerce, "has been most studied, furnish a brief illustration of the proper compass of the maritime law, in the significant descriptive "names which they give to it in the vernacular "tongue." The author here quotes the various names used by the continental writers, and after proceeding with some other remarks, he says: "We find no allusion to tides as "affecting the law; no exceptions of ports or "harbors, or narrow seas, or bodies of counties; "or contracts in unusual form, or sealed or unsealed, within or without a penalty *made on* "*land*, or on shipboard. *The only question is,* "*whether the transaction relates to ships and* "*vessels, masters and mariners, as the agents* "*of commerce on great navigable waters.*" In speaking of building contracts, he says (*Sec.* 264, *p.* 153): "The first man who applies his "service to making a ship available for great "purposes, to which she is designed as a "maritime agent, is the builder. He brings "to the construction skill, labor and capital, "and incorporates all of them, in a great or "less degree, in the fabric. Without his aid "she would perform none of her appropriate "functions, for she could not exist. *This "service is eminently maritime*, although it be "all performed on land. In the same manner, "if he supply capital to purchase that which "is intended to enter, and does enter, into her "construction; and if he furnish neither "labor nor materials, nor money, but gives "simply the skill which plans and directs, or "the care which superintends the labor of "others in her construction, he still performs "a maritime service, although he may never "have been, even for an instant, on the water. "The building contract is a maritime con-"tract, whether it be verbal or written, ex-"pressed or implied. All matters that con-"cern owners or proprietors of ships as such, "and shipwrights, are within the admiralty "jurisdiction."

Davis vs. *A New Brig*, *Gil.*, 473.
Harper vs. *A New Brig*, *Gil.*, 536.
The Hull of a New Ship, *Davies' Reports*, 199; *Godolphin*, 43.

"In the cases of the *People's Ferry Co.* vs. "*Beers*, and *Roach* vs. *Chapman*, the Court "says that the contract for building a ship is "not a maritime contract, because it is a con-"tract made on land, to be performed on land; "the wages of the shipwrights have no refer-"ence to a voyage to be performed." "It "cannot, however, with strict propriety, be "said that a ship is built on the land. Her "keel is indeed laid in an inclined plane on "the shore, and her frame is forcibly kept "from the water, until her hull is so far ad-"vanced as to be buoyant. At the proper "time she is allowed to slide into the water, "where she is made a ship—*finis coronat* "*opus*. From the time when the keel is laid, "to the last work upon her rigging, not a "timber is framed, not a spike nor treenail "is driven, nor a plank, a rope, a block, or "an earing is put in place, except for the "direct useful maritime purpose of making "her a seaworthy ship. On the land, she is "useless; she can neither stand nor go. On "the water, she is the perfection of useful-"ness, as the great agent of maritime com-"merce, to whose wants and exigencies and "perils, she must be well adapted by the "builder. And this is his contract, and his "wages have reference to all her voyages to be "performed. The navigable waters and their "perils, and the ship and her owners, and sailors "and cargo, are all there in maritime com-"merce and admiralty jurisdiction; and "Valin may well say: What would be the "function of Admiralty Courts, if they had "not the jurisdiction of the *building*, rigging, "furnishing, outfit, sale and adjudication of "vessels."

The maritime law as laid down by all the great civilians and jurists, embraced contracts for *building*, repairing, supplying and navigating ships."

The learned author hereupon quotes from the following continental jurists and lawgivers extracts, showing that contracts relating to the *building* of a ship, or furnishing materials therefor, gave a lien on the ship by the general maritime law of Europe to the builder and to the material man — which lien was privileged and formed the subject of admiralty jurisdiction. He quotes:

The Digest, liber 42, *title* 6, *art.* 26–34.
The Consulat de la Mer, chap. 32.
Cleirac jur dela Marine, 351, *art.* 6.
Marine Ordinance of 1691, 1 *Valin.*, 113.
Emerigon's Treatise on Maritime Loans, chap. 12, *sects.* 3, 4 *&* 5, *p.* 566, *quarto edit.*
Boulay Patys Commentaries on the Commercial Code, sects. 1 *&* 2.
English Judges with the King and Council on the Resolutions of 1632, *resolution* 3.
Pardessus, 6 *vol.*, *quarto collection de Loix Maritimes Anterieures au XVIIIieme Siecle.*

The learned author proceeds: "We find that "the history, the text and the commentary of "the codes and collections of maritime usages "from the earliest periods of antiquity leave no "room to doubt the maratime character of "contracts for *building*, repairing and supply-"ing ships, and their lien upon the ship, and "it can hardly fail to excite surprise, that the "decisions of the most learned judges, who "have made the admiralty law under the con-"stitution and decisions of the Supreme Court "the study of their lives, should have been "overruled on the authority of two little con-"sidered decisions of an inland judge of a State "Court, before the constitution had any exist-"ence." He here alludes to the two cases in Bee's reports, quoted by this Court in the 20 *Howard*, 402. "If it were conceded that 'liens "'on vessels encumber commerce and are dis-

" 'couraged,' it could not overrule the maritime law. But liens, instead of encumbering " commerce, facilitate it. They furnish to the " ship builder and ship owner a necessary facility and security for credit, in carrying on " their enterprises till the completion of the " ship, when she can be sold and payment " made from the proceeds, or in case of repairs " or supplies till the earnings of a voyage may " be appropriated to the payment of her bills. " If no builder or shipowner could use his vessel as a means of getting money or credit " everywhere not only where he is not known, " but where he is known, not only where the vessel " does not belong, but in her home port, when " the owner himself negotiates the transaction, " none can know so well as those familiar with " maritime commerce, what beneficial enterprises must fail, and what commercial intelligence and skill must go unemployed or " be brought to ruin by the unforeseen accidents " of the sea. In the language of **Emerigon** " it is just that the workmen and materialmen " should enjoy the lien upon the thing, which " is given them by the Marine Ordinance, they " cannot be deprived of this privilege, except " when it is proved that they trusted the person and not the thing. The lien is always " presumed, but it may be disproved. There " is nothing so much favored. Commerce and " the State are interested in it. Sir **Leoline** " **Jenkins** has ably pointed out the inconvenience to the public and to trade, if the admiralty jurisdiction be evaded among other " things as to building and victualling ships, " and as to materialmen, that is those who furnish materials or supply work for ships."

De Lovio vs. *Boit*, 2 *Gall.*, 466.

The *Maggie Hammond* (9 *Wallace*, 452) quotes with approbation that reference is frequently made to foreign treatises as the sources whence the rules of the maritime law are drawn.

In conclusion, on this point we refer this learned tribunal to the decision of Judge SPRAGUE in the case of the *Richard Busteed* (1*st vol. Sprague's Decisions, p.* 44), reviewing the case of *Beers* vs. *The People's Ferry Co.* (20 *How., p.* 393), and also reviewing the two cases of the *Brig Hannah* (*Bee. Reps.*, 419), and of the *Enterprise* (*Ibid*, *p.* 345,) quoted in the opinion of *People's Ferry Co.* vs. *Beers* in 20*th Howard.*

IX.

If the admiralty courts had jurisdiction either *in rem* or even *in personam* of claims for materials furnished to a vessel in process of construction, it will follow that the State Act of New Jersey, giving a lien and admiralty process to enforce it, was unconstitutional and invalid, because it trenches on the admiralty and maritime jurisdiction of the United States courts which is exclusive, and the bond in question is void.

The corollary of which would be that the decision of the New Jersey Court of Errors and Appeals was erroneous and should be reversed.

***The Josephine*, 39 *N. Y. R.*, *p.* 19.**
***Vose* vs. *Cockroft*, 44 *N. Y.*, *p.* 415.**

Brookman vs. *Hamill*, 43 *N. Y.*, 554.
The Moses Taylor, 4 *Wallace*, 411.
Ferran vs. *Hosford*, 54 *Barb.*, 200.
Ballard vs. *Wiltshire*, 28 *Indiana*, 341.
Vaughan vs. *McCullough*, 28 *Indiana*, 359.
Claycomb vs. *Cohn*, 28 *Indiana*, 483.

X.

It is immaterial, if the contract be maritime, as to whether or not the remedy in the U. S. Courts be by process *in personam* or *in rem*. In either event the subject matter is exclusively within the jurisdiction of the U. S. Courts, and it is for them to judge as to whether they will enforce the privileged lien by process *in personam* or *in rem*, and upon that subject they have enacted rules at different times.

12*th Rule*, 1844.
" " 1858.
" " 1872.
The case of *The Josephine*, 39 *N. Y. R.*, *p.* 19, MASON, *Justice*.

XI.

But it may be claimed that the material men in this case (the defendants in error) residing in New Jersey, their material having been furnished in New Jersey, the owners of the vessel residing in New Jersey, and East Newark in that State being the home port, that no lien existed which could be enforced *in rem* in the admiralty.

(a) Assuming such to be the case, yet the *subject matter* is one of admiralty and maritime jurisdiction. Being such, no State has a right to enact a law authorizing the issuing of admiralty process *in rem.*

The Moses Taylor, 4 *Wallace.*
The Josephine, 39 *N. Y. Reps.*, *p.* 19.

(b.) One of the tests of admiralty jurisdiction is that the vessel against which the lien is sought should navigate navigable waters. By our latest decisions, it is now settled that the admiralty jurisdiction of the Courts of the United States is not limited to tide-waters, nor by the *fances terræ*, or *corpus commitatus*, but extends over the Great Lakes and their connecting waters, and over all rivers capable of being navigated by vessels recognized by the laws of the United States as large enough to be engaged in commerce. Admiralty jurisdiction is not limited to foreign or inter-State commerce, but also extends to commerce between ports of a States, ports of the United States and on the great ocean.

The Genessee Chief, 12 *How.*, 443.
The Magnolia, 20 *How.*, 296.
The Commerce, 1 *Black*, 574.
Sec 237 *Benedict's Admy. Pract.*, *edn. of* 1870.
The *Kate Tremain*, decided by Judge BENEDICT, approved of by *Brookman* vs. *Hamill*, 43 *N. Y.*, *p.* 563.

(*c.*) The furnishing of supplies to vessels owned by foreign owners or by owners residing in other States than the one in which the supplies were furnished, presents a case of maritime character cognizable in the admiralty. Is there any good reason why there should be in the Admiralty Courts jurisdiction in the case of supplies furnished to the three-masted schooner in question, if her owners were residents of the State of New York, than there would be if her owners resided, as they do, in New Jersey? Yet under the authorities, if the three-masted schooner in question had made a voyage and supplies were furnished to her in New York, her owners residing in New Jersey only across the Hudson River, yet the materialman would have a lien and could go into admiralty; proceeding *in rem.*

Now reverse the picture. Her owners residing in New Jersey, a materialman in the latter State, in her home port, could not acquire a lien *in rem* and enforce it in the admiralty. The residence of the owners in either of those cases is the test of jurisdiction, yet the object of their supply in the both cases may be the same. The vehicle of commerce is a three-masted schooner of over 400 tons burthen, intended to navigate or navigating the ocean. Ought it not rather be based on what the expanding views of our highest courts in admiralty have lately denominated it, viz., navigability on waters, capable of being navigated by vehicles of commerce.

In the case of the *Neversink* (*5 Blatchford's Cir. Ct. Reps., p.* 539) it was held by the District Court of New York, and affirmed by the late Justice NELSON on appeal, that on a little inland river navigation the Courts of the U. S. had admiralty jurisdiction to enforce a lien for supplies furnished to a river steamboat at New Brunswick, which was chartered by a charterer living at New York; and yet, while jurisdiction is held in such a case, it is sought to be denied in the present, wherein the three-masted schooner of over 400 tons burthen would in all probability (as has since been the fact) navigate on foreign voyages and to the Spanish main.

There is no reason for the distinction. In the case at bar, the timber furnished was necessary for the construction of the vessel.

If the furnishing such timber was within the scope of a maritime contract, then every element is here presented for a maritime lien.

In the *General Smith* (4 *Wheat. R.*, *p*. 438), it did not appear that the ancient maritime lien was insisted upon—the libellant seeming to have relied solely on the existence of a lien by the statute or common law of Maryland. The existence of a maritime lien was not proved by the libellant—nor discussed by the Court—nor as to whether the admiralty lien in its nature, can or ought to differ from any other lien. But the jurisdiction in admiralty, so far as to authorize suits *in personam* expressly admitted by Counsel and Court (*p*. 443–441).

A lien at common law is the right or interest which a person who has added value to an article either by labor or addition to its substance, has in *the thing itself* by reason of that addition or labor, so long as they remain unpaid for. By the common law, possession is necessary to the continuance of the lien, but in the case of ships, where the origin and reason of the lien is precisely the same as it is in the case of any other article, it becomes necessary for the ship, which is migratory by its nature, to leave the port where the lien is created in order that it may earn the means of paying off the lien, for "ships are made to "plough the sea and not rot against the "wharf."

Benedicts Admty., 277.

Hence there is and ought not to be any distinction on principle so far as regards the origin of the lien between foreign and domestic vessels, and to the ordinary intelligence there is difficulty in ascertaining why the lien should cease in the one case and not in the other when the vessel leaves the port.

The case of the *General Smith* has been followed by the Supreme Court in various cases, but under, we think, a misapprehension of what it meant to decide.

In the *Rock Island Bridge* (6 *Wall.*, 213) the Court say: "The lien and the proceeding *in* "*rem* are correlative, where one exists the "other can be taken." The *Bold Buccleugh* (7 *Moore P. C.*, 284), held, that when a proceeding *in rem* is the proper course, then a maritime lien exists.

The language of this Court in the *Rock Is-*

land Bridge, and the change of the 12th rule in 1872, form a *quasi* adjudication on the point that where a lien *in rem* exists, the proceeding *in rem* follows.

Judge MILLER *in the Selt*, 3 *Bissell, p.* 344, *so holds.*

Davis vs. *Child, Davies* 78.

The Kate Tremaine, approved of in 43 *N. Y.*, 563

N. J. Steam Nav. Co. vs. *M*——— 186, 6 *How.*, 392.

D. J. MILLER in *Wolf* vs. *The Selt*, 3 *Bissell Reps.*, holds that contracts at the home port for repairs, supplies, &c., are now considered as maritime contracts, cognizable in the admiralty.

But this Court has virtually overruled in one respect the case of the *General Smith* in the case of the *Eddy* (5 *Wallace*, 494) by saying, the contract being maritime over which Admiralty Courts have jurisdiction, consequently either party may in a proper case enforce the lien by proceedings *in rem.*

Similar doctrine was laid down in *N. J. Steam Nav. Co.* vs. ——— (6 *How.*, 392). In the *St. Lawrence* (1 *Black, p.*) the lien and proceeding are spoken of as one and the same thing.

In the *Kate Tremaine*, decided by the District Court of the Eastern District of New York, a case favorably spoken of by the N. Y. Court of Appeals; in *Brookman* vs. *Hamill*, (43 *N. Y. Rep.*); in speaking of the *General*

Smith (4 *Wheat.*, *p.*) says: "It declares "an exceptional doctrine which is at war with "all the analogies of the maritime law and has "been continually assailed as without support "in authority and without foundation in rea-"son, and which, I think, must in fairness be "said to have failed to secure a resting place "in the maritime law of America."

The *Maggie Hammond* (9 *Wall.*, 452) alludes to the fact that the principal continental treatises, some of which have been referred to, have been frequently recognized by this Court as the sources from which the rules of the maritime law were drawn, and refers to *Vandewater* vs. *Mills* (19 *How.*, 89, 90); *Dupont* vs. *Vance* (19 *How.*, 168-9).

Lastly.

We claim that the decision of the New Jersey Court of Errors and Appeals in the case below be reversed.

DENNIS McMAHON,
Of Counsel for Plffs. in Error.

Howard & Stover,
Law and Job Printing Establishment,
95 Liberty Street, New York.

Supreme Court

OF THE UNITED STATES.

NELSON EDWARDS *et al*, *Plaintiffs in Error*, *vs.* GEORGE W. ELLIOTT, DAVID RIPLEY, and others.	*Supplemental Points of* D. MCMAHON, *of Counsel for Plaintiff in Error.*

STATEMENT.

THE above-named defendants in error, during the last term of this Court, applied for a writ of certiorari to bring up a rule of the Court of Errors of New Jersey, obtained in April last (1874). This Court, after opposition on the part of the above plaintiffs in error, granted an order that the writ issue, but WITHOUT PREJUDICE.

Return has been made to the said writ of certiorari, whereby it appears that on April 1st, 1874, the Court of Errors granted a rule striking out and annulling their former rule of judgment of affirmance herein, and inserting in lieu thereof a rule which expresses the following points of their decision, viz.: "That Nathaniel Ellis and Henry Jerolemon were within the meaning of the New Jersey lien law owners of the said vesssel when the plaintiffs (the defendants in error) furnished the materials, on account of which the liens were sought to be maintained, and, as such owners, were competent to charge it with liens for such materials. That the respective claims of the said defendants in error were subsisting liens on said vessel within said Act. That the lien law of the State of New Jersey does not conflict with the Constitution of the State of New Jersey by violating the rights of trial by Jury. It is, therefore, determined that the judgment of the Supreme Court of New Jersey be affirmed with costs."

It appears by the Transcript of Record that the original rule of the Court of Errors of New Jersey for affirmance returned in said Transcript of Record (*see folios* 47, 49), was entered in the June Term of said Court to wit, on the 20th day of August, 1872, (*fol.* 48), under the direction of A. O. Zabriskie, Esq., Chancellor of the State of New Jersey, the presiding Judge of the said Court of Errors, who, as appears by the affidavit used to oppose the motion for the certiorari, prescribed the form of it. It appears also by the Transcript that the writ of error to this Court from said judgment was allowed in due form by said presiding Judge (*see fol.* 2 *of Transcript of Record*), *fol.* 53. The bond in error, in the form and in the amount required by the Judiciary Act (*fols.* 49, 52), was duly approved of by the Chancellor of New Jersey (*fol.* 52), and filed with the Clerk of the Court of Errors on the same day, and an order was entered to make return to the writ on August 20th, 1872, (*fol.* 53). The return to said writ of error was duly made by the said Court of Errors (*fol.* 2), and filed in this Court on 6th December, 1872, (*fol.* 56), within the first six days of said term, and this cause was docketed on the Calendar of this Court for the December, 1872, and the October Term, 1873, No. 559 of Calendar of 1872, and 335 on Calendar of 1873.

It further appeared, some twenty months before the new rule was entered by the Court of Errors of New Jersey, from the affidavits used on said motion for a mandamus (*fol. 3 of opposing affidavits*), that Mr. McMahon distinctly, orally, and on his printed brief before the Court of Errors of New Jersey, on the argument of the writ of error, raised and argued among other points the point that the judgment of the Supreme Court of New Jersey, taken up by said writ of error to the said Court of Error was erroneous and should be reversed, because that the lien Act of New Jersey contravened the Constitution and Laws of the United States conferring admiralty jurisdiction. The points so raised and argued were as follows, viz.:

" V. That said lien Act contravenes the Constitution
" and Laws of the U. S. conferring admiralty jurisdiction.
" On this point we cite :

" U. S. Con., Art. 3, Sec. 2.

" Also an Act to establish the Judicial Courts of the
" U. S., approved Sept. 24, 1789.

" I. U. S. Stat. at Large, p. 73.

" Sec. 9. That the District Courts (among other powers)
" shall also have exclusive original congnizance of
" all civil causes of admiralty and maritime juris-
" diction. This Lien Act is a proceeding in rem,
" to wit, against a vessel by name (if she had a
" name).

"*Ben. Ad. Prac.*, § 212, 264, 265 ;

" *Chap.* 20, § 359, 362 ;
" *Chap.* 23, § 436. *Form of attachment ;*
"*Chap.* 23 § 438, 439.

" II. Such proceeding in rem is held to be unconsti-
" tutional.

" 39, *N. Y. Reports, or* 12 *Tiffany;*
" *The Josephine, p.* 19;
" *Ferran* v. *Hosford* 54, *Barb.* 200.
" *Vose* v. *Cockroft* 44, *N. Y., p.* 415.
" *See Brookman* v. *Hamell* 43, *N. Y.*, 554.
" *The Moses Taylor* 4, *Wallace* 441.

" III. This Lieu Act prescribes a remedy which makes
" no provision for trial by jury.

" Constitution, N. J. Art 1, Sec. 7. The right of trial
" by jury shall remain inviolate.

" (*a*). It is a proceeding not only not in accordance with
" the course of the common law but directly
" against it.

" The common law always gives a jury.

" The common law suits even by attachment are per-
" sonal actions.

" It impleads a personal defendant.

" This act is a proceeding wholly *in rem.* The real
" defendant no where appears.

" Real defendant cannot defend unless he give bond
" This is against common right.

" I. Curtis, C. C., 311, Green *v.* Briggs.

" Suppose him unable to give the bond, as many meri-
" torious owners of small vessels would be unable to do.
" We find by Sections 19 to 30, that in case a bond be not
" given or the claims as presented satisfied, then the ves-
" sel be sold and that a compulsory reference be had even
" against the will of the owner.

" *Flint, River St. Bt. Co.* v. *Roberts* 2,
" *Florida*, 102.
" *Parsons* v. *Russell*, 11 *Mich.*, 113.

" 4. What is the right of trial by jury, art. 7th of
" Amendments of Constitution of U. S.

" (*a*). A common law jury of 12 men.
" *Wynehamer* v. *The People*, 3, *Kerman.*
" *Reps.*, 378, 427, 458, 484.

" (*b*). In cases affecting personal liberty, such as
" a charge of misdemeanor, such right
" cannot be taken away by the Legisla-
" ture.
" *People* v. *Johnson*, 2 *Park Cr.*, 322.
" *People* v. *Kennedy*, 2 *Park Cr.*, 312.

" (*c*). In case of an offence indictable at com-
" mon law, it cannot be taken away.
" *Warren* v. *People.*
" 3 *Park Cr., cases* 544.

" (*d*). All property is protected by the Consti-
" tution without reference whether its
" abuse engenders mischief.
" Art 1, Sec. 13-19, of Constitution of
" N. J. Nixon's Dig., p. xx.
" *Wynehamer* v. *The People.*
" 13 N. Y., R. 378.

" Constitution of U. S., 14 Amendt., Sec.
" 1.

" Sec. 2, Art. 1, Const. of 1846, of N. Y., used the " language in connection with the trial by jury, " in all " cases in which it has been heretofore used."

" (*e*). So also a Statute is unconstitutional and void " which authorizes a transfer of one man's property to " another without the consent of the owner, and although " compensation is made (*eg.*) a forcible sale of this vessel " and purchase by a third party as provided for in the " event of a bond not being given.

" *Varick* v. *Smith*, 5 *Caige*, 137, 3 *opn.*,
" 159.
" *Taylor* v. *Porter*, 4 *Hill*, 140.
" *See Bloodgood* v. *Mowawk* & *Hudson*
" *R.R. C.*, 18, *Wend* 19.

It further appears from the opinion of the said Court of Errors and Appeals of New Jersey (a certified copy of which *as delivered*, procured from the legal depository of such opinion, to wit, the Department of State of New Jersey is hereto annexed) that the said points so taken by Mr. McMahon for the plaintiffs in error befoae said Court of Errors and Appeals were by them overruled. See the syllabus of the opinion prepared by the learned judge who delivered it and also the body of it.

Now, as this Court granted the said Writ of Certiorari *without prejudice*, we claim the right to raise notwithstanding the return to the said writ, the following supplemental points tending to show that the case is not in substance changed by the return to the *certiorari* from what it was before, and what it appears on the transcript of the Record.

Supplemental Points

I.

In this case the Writ of Error was properly allowed, viz., by the Presiding Officer of the Court, whose decision is sought to be reversed, within ten days after the actual entry of the rule of affirmance below. A proper bond, with sufficient security duly given. and filed within said ten days; a return duly made and in proper time; the cause duly docketted and entered upon the calendar of this court.

This, by the 24th sectiou of the Judiciary Act, 1st stat. at large, p. 85, is a *supersedeas* of and a stay of all proceedings in the court below.

Consequently the defendant in error, after the cause had been removed into this court had no right to move in the court below, and the court below, after these acts had taken place, had no power nor authority to correct their record in the premises.

Act of Sept. 24, 1789, *see* 23, 1 *stat. at large, p.* 85 ;

U. S. Ex. Rel. Crawford vs. *Addison,* 22 *How., U. S. S. C., R.* 174 ;

Marstella vs. *McLean,* 2 *Cranch, Ct. Ct. R.,* 8 ;

South vs. *Jackson,* 1 *Paine, Ct. Ct. R.,* 486.

See remarks of Thompson J. in this Case, p. 488 ;

Schenck vs. *Canover,* 13 *N. J., Eq.,* 2 *Beas,* 31.

II.

The Court of Error and Appeals of New Jersey had no power, after the writ of error had been taken within the ten days and return made by their presiding officer to the appellate court to make or enter any new rule, the effect of which would be to change the rights of the parties in this writ of error.

Avendano vs. *Gay*, 8 *Wall*, 376;
Flanders vs. *Tweed*, 9 *Wallace*, 425;
Genneres vs. *Bormemer*, 7 *Wall*, 564;
Kearney vs. *Case*, 12 *Wall*, 275;
Smith vs. *Jackson*, 1 *Paine, Circuit Ct. Rep.*, *p.* 486. *Observations of Thompson, J.*, *p.* 488;
State vs. *Judge*, 11 *La. Ann.*, 728;
Stewart vs. *Stringer*, 41 *Mo.*, 400;
Saggs vs. *Saggs*, 1 *Overt.* (*Tenn.*), 2;
Davis vs. *The Seneca*, *Gilp.*, 34;
Ohio Life Ins. Co. vs: Winn., 4 *Maryland*, *ch.* 253.

III.

The old practice of the King's Bench was well settled that after a writ of error was duly allowed and issued, and bail in error duly taken, the court below could not proceed to take any steps. It was even an offence to do so.

2 *Hawk c.* 22, *sec.* 28;
Bacons Abr. Supersedeas H.;
Smith vs. *Cave*, 3 *Lev.*, 312;
Hobart, 329;
8 *Mod.*, 148;

Bacons Abr. Supersedeas, F., 9 *vol.*, *p.* 291 ;
11 *Modern*, 78, (*Anne.*)
Taswell vs. *Stone*, *Burr.*, 2454 ;
Barwell vs. *Black*. 3 *Term R.*, 643 ;
Kanouse vs. *Martin*, 15 *How. U. S. C. R.*, *p.* 198.

IV.

Whether or not the Court of Errors of New Jersey passed on the point of constitutionality urged on the argument of the writ of error before them is of no consequence. It suffices to say that the record presented to them exhibited the point raised, (see assignment of errors, *folio* 42.) And a state of facts wherein litigants claimed to confiscate and take away property from others defending their rights under the pretence that they had a lien created by statutory proceedings asserted to be unconstitutional. That the said Appellate Court sustained such lien, in doing which they must of necessity either have overruled or ignored such objections appearing on the record, such being the case, it is out of the power of such Appellate Court after the record has been removed from them by operation of law to assert we did not mean to decide what our judgment says we must have decided, and thereby the exact point in issue be averted, so as not to overturn an illegal judgment.

The plaintiffs in error here respond to such a position by saying we have done all we could to raise the question of constitutionality.

First.—By assigning it for error.

Second.—By raising it on the argument below, and if the Court of Errors below did not pass upon it, it is not our fault, and we come here to have it corrected; and if on the record presents the point of unconstitutionality, it is unnecessary since the amendment of the 25th section of the Judiciary Act by the Act of Congress of 1867, 14 Stat. at Large, p. 385, to have distinctly appearing on the record the precise point involved.

But the opinion of the Court of Errors shows that they did meet the question and overrule it. (*See same annexed, fols. to*).

Lastly.—We now make our original points, and ask that the judgment below be reversed.

DENNIS McMAHON,
Attorney and of Counsel for
Plaintiffs in Error.

N. J. COURT OF ERRORS.

JUNE TERM, 1872.

NELSON EDWARDS *et al.*,
vs.
GEORGE W. ELLIOTT *et al.*

First.—In an executory contract to build a vessel to be paid for in installments as the work progresses, the title remains in the builder until the work is completed and delivered.

Second—Where by the terms of the contract where an installment was paid, the vessel so far as then constructed, was to become the property of the purchaser—*held* that the burden was on him to show the time of payment, and that his title vested before the lien attached.

Third.—A contract to build a vessel within the State' is not a maratime contract, and the statutory remedy on such contract does not conflict with the Constitution of the United States.

Fourth.—The act for the collection of demands against ships, steamboats and other vessels (*Nix. Dig.* 576) does not conflict with the Constitution of New Jersey by violating the right of trial by Jury.

N. J. COURT OF ERRORS,

JULY TERM, 1872.

NELSON EDWARDS *et al.*,
vs.
GEORGE W. ELLIOT *et al.*
In Error to Supreme Court.

Argued by

DENNIS McMAHON, (N. Y.),
for Plaintiffs.

A. Q. KEASBY,
for Defendants.

AN article of agreement was made Nov. 3, 1866, between Henry C. Jeroleman of the first part and Nelson

Edwards and others of the second part, for building a schooner of specified dimensions, contents and finish for the consideration of fifty-four dollars per ton. The builder to furnish all labor and materials and deliver the vessel in May, 1867. The payments were to be made as follows: $2,500 when the keel was laid; $3,000 when the frame was all up; $3,500 when ceiled—deck beams in, kneed off and decks laid; $3,500 when outside planks were on and squared off; $3,500 when the poop deck was on; $2,000 when ready for launching, and the balance when delivered according to contract. And it is agreed that as the said several installments were paid, and upon the payment of each installment, the schooner so far as then constructed and the materials therein inserted should be and become the property of said Edwards and others.

The schooner was built at East Newark, Hudson County, N. J., in the winter and spring of 1867, Charles Elliott and David Ripley and others, defendants in error furnished timber for the vessel, and on June 19, 1867, caused the same to be seized by the Sheriff under "An Act for the collection of demauds against ships, steamboats and other vessels, approved March 20, 1857, and supplement (*Nix. Dig.*, 576–81).

At the time of the seizure the schooner was unfinished upon the stocks, and had not been launched, nor named, enrolled, or licensed.

July 3, 1867, the defendants below, Edwards, Woolsey and Collins gave bond to Elliott, Ripley and others, lien claimants for $4,894.32, under sec. 12 of the above Act, and the vessel was discharged from seizure.

Elliott's bill was $201.70 for chestnut timber furnished in November, 1866. Ripley's bill was $2,245.46

for oak-pine, &c., furnished between January 15 and May 10, 1867.

An action was brought in the Supreme Court on the bond. The defendants demurred. The demurrer was overruled. The defendants afterwards filed special pleas. A special verdict was rendered, and judgment thereon entered in the Supreme Court. A writ of error on said judgment was issued and returned to this Court.

SCUDDER, J.—Upon the special verdict rendered in this cause the Supreme Court has adjudged, as appears by the record returned that the Act entitled "An Act for the collection of demands against ships, steamboats and other vessels," approved March 30, 1857 is vaiid and constitutional, and that Nathaniel Ellis and Henry Jeroloman, the builders of said vessel were the owners thereof, and competent to charge it with liens, and that the respective claims of the plaintiffs were subsisting liens under the laws of the State of New Jersey, on the said vessel at the time of exhibiting the same, and that the accounts claimed by the plaintiffs were due in this suit. Errors are assigned upon the several points of the judgment.

I will consider first the construction of the statute in its application to the facts in this case, as they appear on the record, assuming its validity; and next the validity or constitutionality of the Act so far as it affects this action.

The suit is upon the bond given by the defendants to the plaintiffs below to discharge the vessel from the seizure of the Sheriff. This bond is compulsory, in *invitum*, put upon them by the statute before they can take their property from the custody of the law. They should not, therefor, be shut out from any defence which they have to the merits, and which they have pleaded and presented to the Court with proper diligence and without waiver. The condition of the bond is that the obligors shall pay the amount of all such claims and demands as shall have been exhibited to said commissioner which shall be established to be subsisting liens upon said vessel, pursuant to the provisions of said Act, at the time of exhibiting the same respectively.

There can be no subsisting lien if the provisions of the Act have not been met; or if the Act itself is a nullity. These particulars must be established by the plaintiffs when challenged, and denied in proper legal form by the defendants; and this defence is open to them by the very terms of the condition of the bond.

1. Are these claims subsisting liens under the statute, assuming its validity?

It is insisted in opposition that the two several debts in the declaration mentioned were not contracted by any *master*, *owner*, *agent*, or *consignee* of said schooner. The timber was bought for the vessel by Jeroleman, who was the contractor and builder. It is said he was only the builder, not the master, owner, agent or consignee.

The vessel when seized by the Sheriff was on the stocks in the possession of Jerolemon. To be built and finished under his contract with Edwards and others above stated. The work was all done and materials furnished by him. It was not completed, nor delivered, and the title remained in the builder; unless there is some special conditions in the contract which alters the general principle of law. See the case cited in the opinion delivered in the Supreme Court especially, *West Jersey Rail Road Co.* vs. *Trenton Car Works,* 3 *Vroom,* 517, decided in this Court June Term 1866, holding that in the case of an executory contract for the sale of an article not in existence but to be manufactured, even when the contract price is paid in advance, no title passes until the thing is completely finished, and is either delivered to the order or is appropriated to his benefit, or set apart for him, or is accepted by him. It is claimed that there has been a delivery, appropriation and acceptance under the terms of the contract. The only part of the contract that can have this effect is the express provision that from time to time as the several installments were paid by the parties for whom the vessel was built, and upon the payment of each installment, the said schooner so far as then constructed, and the materials therein inserted, shall be and become the property of the said parties of the second part.

This is an agreement that on payment of the first installment, and of each succeeding installment, the general property in so much of the vessel as is then constructed, shall vest in the purchasers. It is not necessary therefore to do more than again refer to the authorities cited in the opinion of the Supreme Court, upon the effect of a stipulation in an executory contract to pay certain installments as the work progresses. A summary and review of all the important cases upon this point will be found in the brief of counsel, and in the opinion of (*Denio J., in Andrews* vs. *Durant,* 11 *N. Y.*, 35). This last case denies the authority of (*Woods* vs. *Russell,* 5, *Barn & Ald.*, 942, *and Clark* vs. *Spencer* 4 *Ad &El.*, 448), which have often been doubted, explained and modified, and returns to the principle held in the earlier English cases, and in (*Laidler* v. *Burlinson,* 2 *Mees & Wel.*, 602), that the general rule is that under a contract for building a vessel or other thing, no property vests in the person for whom it is agreed to be built until it is finished and delivered. This case also holds that the rule is the same where certain portions of the contract price are agreed to be paid and are paid by the builder at specified stages of the work ; and where an agent of the person for whom the article is to be constructed is appointed and actually does superintend and approve the materials and work. Thus covering the points wherein (*Woods* vs *Russell and Clark* vs *Spencer*) are distinguished from the general rule. In the present case our Supreme Court have decided that in an executory contract to build a vessel to be paid for in installments, as the work progresses, the title remains in the builder until the work is completed and delivered. The rule is accurately expressed and is supported by the weight of authority. But in this contract we have something different—the express stipulation that the property shall pass as the several installments are paid, and it is contended that upon the payment of an installment the builder ceases to be owner, and the person who furnished materials to the builder could have no lien. The true construction of such contract and its effect in depriving a party of a lien can be determined when the question arises. Here there is no proof that any installment was paid before all the materials were furnished, and the vessel seized by sheriff.

The only finding of the Jury in their special verdict upon the point is " that the original contract price for constructing said vessel would have been about $21,000, but said Jeroleman was paid in excess of such price about $1,500. There is no time given and no fact stated upon which an appropriation of payment could be founded. The builder was therefore in law still the owner of of the vessel, and the debts contracted by him become liens on the vessel under the statute.

The burden of proof was on the defendants to show their payments and the change of title if there were any.

The next point of exception is that this act is not intended to apply to vessels on stocks newly and primarily built. The different particulars in the statute under sec. 1—3—8 are cited to show that an existing vessel having a name, a commander, tackle, &c., is contemplated; but the first section which gives the remedy is more general, and by separating its terms we have lien given for a debt contracted by the owner for work done, or materials or articles furnished in this State for or towards the building of a ship or vessel. The suggestion of counsel that this means re-building is a substitution of one thing for another without authority, a shaping of the statute to fit the argument. There is no sufficient reason to suppose that the act excludes a lien for building a new vessel. It includes this, and also the repairing, fitting, furnishing or equipping an existing vessel. The words and terms may be used disjunctively.

These are the points of objections to the statute ssauming it to be valid, but denying its application to the case. But it is further insisted

1. That this lien act contravenes the constitution and laws of the United States, conferring admiralty jurisdiction on the Federal Courts.

Art. 3, *Sec.* 2, *includiug acts* 1789-1854.

2. That it violates the right of trial by jury given by the Constitution of New Jersey.

The first of these Constitutional objections was disposed of on the demurrer to the declaration. The Court overruled the demurrer and held that the contract for building a ship within the State is not a maritime contract but a contract for building entirely under State control, which may be enforced by a common law remedy or by any new remedy which the Legislature may provide. To avoid any misapprehension it is, however, stated that so far as this law is designed to aid in the enforcement of a maritime contract for which admiralty may proceed in *rem*, it is clearly in conflict with the Constitution and laws of the UnitedStates.

Whether this last ruling conflicts with *Randal* v. *Roche*, 1 *Vroom*, 220, it is not necessary now to consider, but it is sustained by the cases in the United States Supreme Court cited in the opinion delivered in the Court below; and in the recent cases, *In re Josephine* 39 *N. Y.* (12 *Tiff.*) 19; *Jackson* v. *Steam Propeller Kinne, United States District Court of New Jersey. Am Law. Reg., Vol.* 8, 470; *Vose* v. *Cockroft* 44 *N. Y.* 554 *Sheppard* v. *Steele*, 43 *N. Y.* 52.

The judgment upon the demurrer is not before us on this writ of error, which brings up only the judgment of the Supreme Court upon the special verdict. But as this later judgment also determines in general terms that this act is valid and Constitutional, it may be proper to repeat the qualification made in the Supreme Court, that it is Constitutional in its application to this particular case of building within the State.

The next point urged that this lien act prescribed a remedy which makes no provision for a trial by jury, was pressed with much earnestness by counsel mainly on the authority of *Parsons* v. *Russell* 11, *Mich.* 113; *Green* v. *Briggs*, 1, *Curtis C. C. R.* 311; and *Wynehamer* v. *People* 3, *Kern.* 378. The last two cases arose under acts for the prevention of intemperance, which were summary in their proceedings, confiscating liquors, fining and imprisoning by quasi criminal processes and were new and anomalous in many of their features. It is sufficient to say that they are not applicable to the present case for reasons that will hereafter appear in considering our law with referance to other existing statutes. The case of *Parsons* v. *Russell* is under a statute similar to ours and appears to be directly in point, but it was decided by a divided Court with little notice of other statutes *in pari materia*, if any there be in that state and it is without conclusive authority or precedent. The counsel have not found another case of like purport.

On the other hand *Sheppard* v. *Steele*, 43 *N.Y.* 52, decides that their lien law of 1862 entitled "An Act to provide for the collection of demands against ships and vessels" which is similar to ours is not unconstitutional as infringing the right of trial by jury. The reason assigned is that liens were given in such cases before the Constitution of 1846, which were enforcible in equity without a jury and that they were not therefore cases where within their Constitution (*art.* 1-2) a trial by jury had heretofore been used. But this is not all. A fuller consideration of the opinion of the Court is instructive in determining the present case. Its statements condensed and generalized that the Legislature could give a lien ot this kind and in the absence of any statutory remedy, provided equity would enforce it without a jury by process older than our Constitution, distinguishes this remedy from the ordinary issues in civil causes before a jury. It gives to us intimations of remedies in particular cases which have come to us from the civil law and which have been used for centuries without a complaint that they infringe on the common law right of trial by jury. Such are also the proceedings in Courts of Equity and other Courts adopting its forms. So in Admiralty Courts in the enforcement of maritime liens. So in special cases of statutes in analogy with these extraordinary remedies we have a new and peculiar jurisdiction conferred. 1 *Pars., Mar. Law* 489 ; *Story's Eq. Jur.* 506, 1215.

Our colonial constitution of July 2d. 1776, Sec. 22, ordained that "the inestimable right of trial by jury should remain confirmed as a part of the law of this colony without repeal forever."

Yet, in 1798, an attachment law against absconding and absent debtors was passed which has the very features which are the most obnoxious to the charges made against this law, and it still stands upon our statute books enforced daily in our Courts without a question as to its constitutionality.

The goods of a defendant upon affidavit of indebtedness, &c., are seized, notice is advertized ; if he fail to appear his property is sold by auditors and distributed amongst the applying creditors. The defendant may thus be deprived of his property without a trial by jury. Who doubts the legality of this proceeding ? If the defendant appears the statute regulates the method and the manner of discharging his personal property from the lien of the attachment. He was required by the older statute to enter into special bail—by later statute to give bond with one or more sufficient sureties approved by the Court in double the amount of the personal property attached conditioned for the return of the goods if judgment be entered for the plaintiff. By this his goods are relieved and he may plead and have his trial by jury. This is substantially the form of remedy given to enforce the lien against vessels under the statute in controversy

Our present constitution of 1844 agrees substantially with the old constitution in securing the right of trial by jury, Article 1–7 ordains that the right of trial by jury shall remain inviolate. It is now said that this recent law of 1857 violates this right, because it requires a person to give a bond, which from poverty and being unknown he may be unable to do before he can have a trial by jury.

The requirement to give a bond is for the discharge of his property from the lien and custody of the law, and then he has his trial by jury upon the issue whether he is a debtor or not. He must exercise his right under such reasonable regulations as the Legislature may establish for the security of creditors, and there is no violation of the right.

When goods were taken in distress for arrears of rent, although they were formerly only detained as pledges, for enforcing the payment of such rent a more effective remedy was provided by an act of 1795. After holding the goods for ten days with notice of the taking, if they were not replievined they were sold, and the proceeds applied to the payment of the rent. A bond must be given in replevin before the goods are discharged and before the right to sell them can be tried by a jury under this statute.

In 1855 a supplement to our practice act was passed requiring the defendant in every action at law to file with his plea an affidavit that the same is not intended for the purpose of delay, and that he verily believes he has a just and legal defense to said action on the merits of the case. No such requirement existed before the constitution of 1844.

If this affidavit is not filed the defendants plea is a nullity, judgment by default is entered, an assessment of damages is made by the Court, or by a Judge or Clerk of the Court in vacation, and his property is sold under execution. These bonds and affidavits are regulations of the practice of the Courts which precede the trial, and are in no legal sense a violation of the right. This right of trial by jury in civil causes as commonly understood, and as construed in our Courts, is the right to have all such causes heard before a jury of twelve men, according to the usual process and practice of the Courts of common law. It is intended to prevent the arbitrary seizure and disposition of person or property and the determination of rights affecting them without the regular and orderly proceedings of Courts of Law.

If a person is arrested he gives a bond, and the right of action is tried. If his property is seized he regains it by giving security for its return if the right is determined against him. In each case his right to to a jury trial remains.

This Act of 1857 giving a lien on vessels introduces no new or arbitrary remedy, but uses such as is well known and used in law in similar cases, and the right of trial by jury under its proceedings remains inviolate. This conclusion appears to be clearly within the construction which has been given to the sections of the Constitution of the United States, and the Constitution of other States, aud many statutes of like import. See *Ledg. Stat. and Const. Law*, 548; 1 *Bish. Co. Prac.*, 892 *and Notes*; 2 *Story's Const.*, 1761; 2 *Kent Com. Sec.* 24, 12; *Bonaparte* vs. *C. & A. R. R. Co.*, *Bald. R.*, 205; *McGear* vs. *Woodruff*, 213.

The judgment of the Supreme Court is affirmed.

State of New Jersey,
Department of State,

I, Henry C. Kelsey, Secretary of State of the State of New Jersey, an *ex officio* Clerk of the Court of Errors and Appeals, in the last resort in all cases,

Do hereby certify that the foregoing is a true copy of an opinion read in the above stated cause, June Term, 1872, as taken from and compared with the original now remaining on file, and of official record in this Department.

In testimony whereof I have hereunto set my hand and affixed the official seal of said Court this sixteenth day of July eighteen hundred and seventy-two.

(Signed,)

HENRY C. KELSEY,
Secretary of State.